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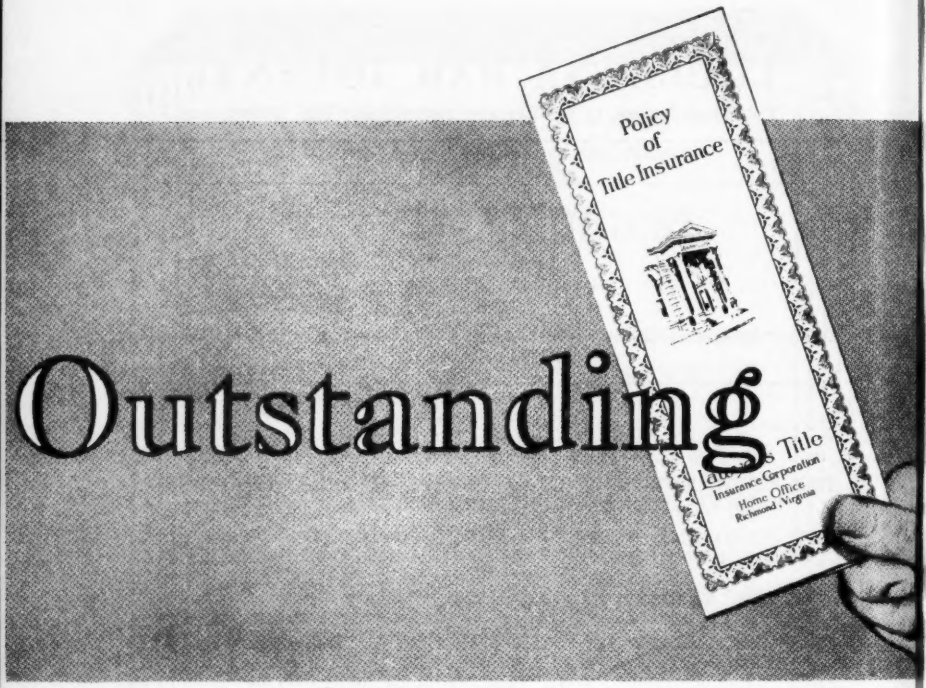

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The Covenant on Human Rights and the Proposed "Federal" and "Colonial" Clauses

Delivered by Joseph Dainow, Professor of Law, Louisiana State University Before Section of International Comparative and Military Law, Alexandria, April 24, 1953

INTRODUCTION

The subject of human rights is much too extensive and dedetailed for a talk at this meeting to be a comprehensive address; my comments will be more in the nature of an outline to indicate the principal ideas and to sketch in some of the special issues.

By way of historical background, I would make only two statements. One is that respect for human beings as individuals, and recognition of human rights, have not always existed. The second statement is that one phase of the history of civilization has been the increasing recognition of individual human dignity and all its incidents.

During relatively recent years, certain international treaties and conventions have included provisions concerning religious liberty and the protection of minorities; but these instances were few and scattered. It was only as a sequel to the degradation and inhumanity which occurred before and during the Second World War, and based upon a realization of the connection between such acts within a country and its aggressive relations against other countries, that individual human rights became a matter of international concern and of international relations.

The first formal expression on human rights of real international scope came in the United Nations Charter, which contains seven specific references to human rights. In particular, there is Article 55, wwhich reads as follows:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> "a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> "b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> "c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

COMMISSION ON HUMAN RIGHTS

The first step in the direction of effectuating these principles of the Charter was the action taken by the Economic and Social Council of the United Nations in establishing the Commission on Human Rights. The functions of the Commission were to make proposals, recommendations, and reports. After preliminary deliberation as to methods and procedures, the Commission adopted the following plan, to consist of three stages:

(1) the drafting of a declaration, which would contain a general statement of principles and rights and freedoms:

(2) the preparation of an international convention, drawn in precise terms, which would make the document suitable for adoption as a treaty;

(3) the establishment of measures of implementation to provide for supervision and enforcement.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

It must be recognized that to obtain agreement on a statement of general principles and ideas is not as easy or as simple a matter as one might expect. Among the members of the United Nations, there are groups which represent different philosophies not only as to international political relations and the cosmic relationships of man but also with reference to individuals as human beings. There are many serious differences between the civilizations of North America, South America, Western Europe, Eastern Europe, Islam, India, China, and so forth. It was accordingly a great achievement of mutual understanding for the Commission on Human Rights to have succeeded in drafting an acceptable document called the Universal Declaration of Human Rights. To those who had worked slowly and patiently on the original formulation it was an encouragement when the text was approved by the General Assembly of the United Nations in December 1948.

In basic substance, the provisions of the Declaration were classified into two groups: (1) the civil and political rights; and (2) the economic and social rights.

It would be too lengthy to read in full the text of the Declaration, and it will suffice for present purposes merely to list the more important rights included.

Among the *civil and political* rights are the following:

life, liberty, security of person, fair trial;
freedom of thought, speech, religion, assembly;
self-government through free elections;

nationality, movement, and political asylum;
freedom from arbitrary arrest and interference with privacy;
prohibition of slavery and torture.

Among the *economic and social* rights are the following:

work and trade unions;
adequate food, clothing, and housing; and adequate living standards for health and well-being;
education, rest, leisure;
no discrimination as to race, color, sex, language, religion, political opinion, property, birth, or origin.

The Universal Declaration of Human Rights has no binding effect on the members of the United Nations; it is merely a statement of aspirations and objectives. Nevertheless, the Declaration was meant to have, and it has already had, a very extensive educational and inspirational character. The effectiveness of the Declaration has been demonstrated by the fact that it has been translated into 46 languages and distributed throughout the world, and parts of the Declaration have already been reproduced not only in national constitutions and legislation but also in international conventions.

The Universal Declaration of Human Rights has indeed become established as a source of new hope and inspiration throughout the world to millions of people who are looking out of darkness and poverty toward personal security and dignity.

THE COVENANTS OF HUMAN RIGHTS

The first plan to have all the rights contained in one covenant was superseded by a later plan to separate them into two covenants. It was considered that the civil and political rights would be susceptible of accomplishment by legislative and administrative measures within a reasonably short time. The decision to have a separate covenant for the economic social, and cultural rights was based on the realization that their accomplishment would be more gradual and would involve not only legislation but also other means, and that the program would take a longer time looking to the promotion of conditions rather than the enforcement of rules. Although the various rights are divided among the two covenants, the plan calls for simultaneous presentation of the two when fully drafted.

The covenants are non-self-executing, and it would be incumbent upon each country to take steps, in accordance with internal constitutional processes, to bring the provisions into ef-

fect as expeditiously as conditions permit.

To convey a more specific impression, I would like to read the partial text of some of the civil and political rights:

Art. 5. "No one shall be arbitrarily deprived of his life. Everyone's right to life shall be protected by law. . . ."

Art. 6. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . ."

Art. 7. "1. No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.
"2. No one shall be held in servitude.
"3. (a) No one shall be required to perform forced or compulsory labour. . . ."

Art. 8. "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. . . ."

Art. 12 "All persons shall be equal before the courts or tribunals. . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . ."

Art. 14. "Everyone shall have the right to recognition everywhere as a person before the law."

Art. 15. "Everyone shall have the right to freedom of thought, conscience and religion. . . ."

Art. 18. "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. . . ."

Art. 19. "All persons are equal before the law. The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

IMPLEMENTATION

The Commission on Human Rights has not yet completed the drafts of the two covenants; and until that task is done, the proposals of measures for implementation cannot receive very extensive attention. There are some draft provisions, which were drawn up at the time of the original plan to have one covenant, but these have not been reviewed thoroughly yet. Only a brief indication can be made at this time that the present draft provides for reporting procedures to the Commission on Human Rights, to the Economic and Social Council, and to the General

Assembly. A proposal to provide for complaints made by individuals, groups, or nongovernmental institutions was rejected by the Commission. Accordingly, the existing drafts provide that complaints may be made only by countries ratifying the covenant.

SPECIAL ISSUES

Among the more specific issues which have given rise to extensive discussion and controversy are the following: (1) the federal-state clause, (2) the colonial clause, and (3) the self-determination article.

The Federal-State" Clause (Art. 48)

In a country with a federal form of government, it is the federal government which negotiates and concludes treaties, as the person in international relations. Likewise, in a country with a federal-state organization, there are likely to be some aspects of human rights which are not within the scope of federal legislative competence. The discrepancy of the federal government power at these two levels creates a problem concerning the ability of a federal state to fulfill the obligations which it would undertake in a treaty. On the other hand, the exercise by the federal government of the power necessary to implement fully the obligations under a treaty of this sort is usually resisted by the state governments, which are most jealous of their own jurisdiction.

In the very early stages of discussion on the covenant, the United States representatives in the United Nations made it clear and insisted that it would not be possible for the United States to adopt the covenant unless it contained a federal-state clause. Such a federal clause was proposed by the United States (and other countries) in order to insure the constitutional balance between the federal government and the state governments.

The substance of the proposed federal clause, insofar as it would affect the United States, contains four elements and may be summarized as follows:

(1) concerning matters within the jurisdiction of the federal government, the United States would undertake the same obligations as other ratifying countries which have a unitary form of government;

(2) concerning matters within the exclusive jurisdiction of the state governments, the United States would be under obligation to notify the individual states and to make a favorable recommendation; at the same time there would be a request for infor-

mation as to the existing state laws on each of the subjects indicated;

(3) the United States would be under obligation to transmit to the United Nations the information obtained from the several states;

(4) the proposed clause expressly excludes from federal jurisdiction any matter which would not be within the scope of federal competence exclusive of any provisions in the covenant.

The problem of the federal state exists not only in the internal governmental relationships within its own country, but it is brought out even more sharply by the opposition of the unitary states who would be bound by the entire covenant while federal states would not undertake the same commitment.

A number of other countries with a federal-state organization have been faced with the same problem as the United States. In Australia, the issue has been resolved in favor of the federal government by the recognition of its authority to legislate on anything that is necessary for the implementation of a treaty; there is enough confidence that the federal government will not conclude a treaty in bad faith simply to extend federal powers into areas of internal state jurisdiction.

In Canada, the problem is not as intensive as it is in the United States. Under a recent decision of the Privy Council, the implementation of treaty provisions is recognized as an obligation of both the federal and the provincial governments, with appropriate responsibility for the accomplishment of the necessary purposes.

Although Switzerland is organized on a federal basis, the problem is not likely to be acute because of the very wide scope of federal competence which exists under their constitution.

In the federal states of Brazil and Mexico, there is no problem at all because the subject matters encompassed by human rights have been leclared to be entirely within the federal jurisdiction.

In the United States, there is really a fundamental policy question, namely, whether to assume international responsibility for the implementation of standards of human rights as effectively as possible within the existing constitutional framework and with a sharing of responsibility between the federal and state limited extension of federal competence where necessary for the fulfillment of international obligations.

The federal system of government is not well suited for international cooporation. In order to make it work effectively,

mutual comprehension and confidence must be added to patience and good will in the working out of solutions.

The "Colonial" or "Territories Application" Clause (Art. 47)

The countries principally concerned with this special issue are those which still have dependent territories, particularly the United Kingdom, Belgium, France, and the Netherlands. The colonial powers proposed the inclusion of a clause authorizing the extension of the covenant by a metropolitan signatory state to its dependent territories, if it wished to, but without being required to do so. The reasons advanced for such a clause included the following: (1) some territories were not yet ready—politically, economically, socially, and culturally—for the rights described in the covenant, and (2) in many instances, the need to obtain local legislative approvals would necessarily cause great delay in ratification by the methopolitan signatory state. This proposed "colonial application" clause was rejected by the Commission.

The smaller countries and those which might be described as undeveloped insisted upon the automatic extension of the covenant to all territories of the signatory states. This view has prevailed in the General Assembly and is reflected in the following proposed text:

> "The provisions of the present Covenant shall extend to or be applicable equally to a signatory metropolitan State and to all the territories, be they Non-Self-Governing, Trust, or Colonial Territories, which are being administered or governed by such metropolian State." (Art. 47, Draft Covenant on Civil and Political Rights.)

The "Self-Determination" Clause (Art. 1)

The substance of the self-determination clause consists of three elements: (1) all peoples and all nations shall have the right freely to determine their political, economical, social, and cultural status; (2) all United Nations members shall promote realization of this right in all their own territories, and shall respect it in other countries; (3) the right of self-determination by peoples includes permanent sovereignty over their natural wealth and resources.

The United States has approved the first two of these elements but has objected to the third.

Within the United Nations a certain amount of opposition has been generated to the self-determination clause on the

grounds that (a) it is well nigh impossible to define the right clearly, (b) it creates special problems concerning minorities and might encourage the dissensions of subversive groups, and (c) it discriminates unfairly against United Nations members who administer dependent territories while not applicable to countries who are not members of the United Nations.

HUMAN RIGHTS AND WORLD PEACE

Human Dignity and Security

Respect for individual dignity must be seen in a *world* context of significance. The denial of human rights within a country is likely to be, and has been, closely related to aggression against other countries. No people can be secure unless all people are secure.

HistoricalDevelopments of Human Rights

In the progress of civilization there has been a continual movement towards more respect for human beings as individuals and as persons. Concomitantly, there have been constant trends of more fundamental democratization in society (suffrage, representation, free schools, wages and conditions of work, housing and community planning and recreation, and so forth).

In addition to, and as a result of, the United Nations Charter and the Universal Declaration of Human Rights, there have been two recent events of particular significance in the process of establishing stronger international recognition of the developing standards and objectives concerning human rights. In May 1948, the Ninth International Conference of American States, meeting in Bogotá, Colombia, adopted the "American Declaration of the Rights and Duties of Man." In November 1950, a "Convention for the Protection of Human Rights and Fundamental Freedoms" was adopted by the Council of Europe (Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Saar, United Kingdom). Both of these documents adhere to the principles and follow the patterns of the Universal Declaration.

National Policy and Foreign Policy of United States

The human rights program is an integral and indispensable part of a total program designed to preserve peace and to maintain a free society for as many peoples as possible. It is generally supported by the free countries of he world and has become a part of the national policy of the United States.

As a matter of foreign policy, the United States is being

watched closely, and our actions are evaluated more significantly than our words and our money. The United States must have faith and courage, and it must act correctly to retain its leadership of the free world.

The fundamental policy question is: Are the human rights and security of the people in the United States, and everywhere else, sufficiently important for the United States to enter into this kind of responsibility with other nations who are willing to do the same?

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The Need and the Basis for Constitutional Revision

(Paper delivered by Thos. W. Leigh of Monroe before the Section on Judicial Administration of the Louisiana State Bar Association at oits meeting in Alexandria, April 24, 1953)

Your program committee has arranged for this meeting a panel discussion on the general topic of Constitutional Revision with the object in view (as I understand it) pointing up some of the legal, legislative, and political problems that enter into a labor of this magnitude. Your Chairman has asked me to participate in this discussion and has assigned as the subject of my remarks the title "The Need and the Basis for Revision."

Believe me, it is a privilege to appear, on any occasion, before the members of this Section which I regard as one of the most important in our whole State Bar organization. But it is particularly gratifying to take part in your program this afternoon, since I feel that the whole subject of constitutional revision is one in which not only the State and local bar associations but every individual member of the Bar should take an active interest and as to which we should all take a definite and concerted stand.

You are all familiar, at least by name, with the confederation of states which, in the middle ages, served as a bulwark to protect Central Europe from being overrun by Asiatic hordes, and which was known as the Holy Roman Empire. This confederation maintained its existence for several hundred years before finally falling apart of its own weight. Some historian, whose name I do not now recall, in commenting upon the era of its decline pointed out that it had never been holy, that it was no longer Roman, and was certainly not an empire. I submit that an analogous indictment can be returned against the document which we refer to as the Constitution of 1921: In its present form it can no longer rightly be called a constitution, and, it certainly cannot be assigned to the vintage of 1921.

This is a sweeping indictment. Let us examine whether the evidence supports the charge.

A constitution is defined by Webster's New International Dictionary as "a written instrument embodying the *organic* law

or principles of government of a nation or state and laying down *fundamental* rules and principles for the conduct of affairs." Can this document, which we charitably call a constitution, be brought, in its present form, within that definition?

Every member of the Bar here present, whether advocate or jurist, is all too fully aware of the fact that our Constitution must be consulted not only for our organic law—for the fundamental principles of our State government—but also for the detailed provisions of many substantive and procedural laws which are purely statutory, and oft-times local, in their significance.

Many of our constitutional amendments are, in fact, nothing more than Statutes—which have been enacted into law with the formalities required by the process for amending the constitution. For example, the Fire and Police Civil Service amendment adopted at the general election last fall even retains the short title provision—a purely tstatutory device. One of its opening sections provides that it shall be known and may be cited as "The Municipal Fire and Police Civil Service Law."

Again for example, the provisions for an additional tax of 1c per gallon on gasoline, which were added to the Constitution as an additional Article—Article VI-A—by an amendment adopted in 1930, prescribe intricate statutory machinery for the reporting and collecting of this tax, and the allocation of the proceeds thereof, all of which was made self-executing, and which requires no further or other legislation to make it effective. Section 22 of Article VI, dealing with the general Highway Fund, which was initially less than a page in length now takes up 26 pages of fine print as the result of having been amended on no less than 10 different occasions. And most of these amendments go far beyond any requirements of organic law, providing complex administrative procedures involved in the issuance of bonds and the expenditure of the funds derived therefrom.

Examples of this integration into our Constitution, by means of the amending process, of enactments which are strictly statutory in character could be multiplied almost ad infinitum, and will come into the minds of everyone here present. And the conclusion is irresistible that, however effective the Constitution of 1921 might have been at the time of its adoption, this amalgamation into that instrument of statutory material has resulted in a document which, by the definition quoted above, is no longer a constitution. What was a *constitution* in 1921, has become a *conglomeration* in 1953.

It is equally obvious that 1921 is no longer the dominant date which characterizes this document, for only a fraction of its total content was adopted in that year. As a matter of fact, the 34 amendments which were ratified at the last general election added to this document approximately as great an amount of written material as was included in the entire Constitution at the time of its adoption.

When adopted, the Constitution of 1921 consisted of twenty-one articles in addition to the schedule article which merely provided for an orderly transition from the Constitution of 1913. These 21 articles were divided into 373 sections, requiring less than 100 printed pages to set out in full. Since that time our Constitution has been enlarged by no less than 302 separate amendments, almost as many as there were sections in the original document. These have been adopted by the voters at 19 different general elections. Each of the 16 general congressional elections which have been held in the 32 years since 1921 has seen its quota of constitutional amendments to be voted on by the people, and on three occasions, in 1928, 1940, and 1947, additional amendments were also submitted at the general elections held in the spring of those years. The number of proposed amendments submitted at any one election has ranged from a single amendment submitted and adopted in April, 1947, to the 41 proposed amendments which were submitted at the general election held in November, 1948. This use, or perhaps I should say abuse, of the amending process has resulted in a document which is now longer than the constitution of any other state in the union, embracing (so I am told) some 184,000 words and requiring several hundred pages to set it out in full. I have already pointed out that the material added in 1952 alone, most of which was statutory in character, approximately doubled the length of the original Constitution, and I daresay that as much or even more material has been added on previous occasions.

When these statistics are taken into consideration, it is obvious that the original Constitution of 1921 has been relegated to a minor role insofar as total content is concerned; and that the evidence preponderates overwhelmingly against the year 1921 as its distinguishing date.

I submit that the evidence which can thus be marshalled in support of the indictment which I suggested a moment ago is at least sufficient to warrant holding the defendant for trial on the charge as made.

But, more important, I believe that everyone here will also

agree that the need for constitutional revision has long since become critical. And if the past offers us any criteria for the future, each biennial session of our Legislature will continue to emphasize that need and make it more acute.

Once we have established and acknowledged the need for a revision of our existing Constitution, our attention naturally turns to some consideration of the basis for such a revision, and here let me say that although I have made a considerable point of the length of our present Constitution, I am not suggesting that length or brevity, per se, should be a determining factor in the drafting of any constitution which might be formulated. A constitution must contain all the material necessary to accomplish its purposes, regardless of length, and nothing should be omitted merely for the attainment of brevity.

But if we were to preserve the relationship which should exist between the constitution on one hand, by which our government is instituted, and the statutory enactments on the other hand, by which that government is to function, care must be taken that a constitution should not usurp the functions of a statute, just as we must also take care that once the fundamental principles of government have been set forth in a legally adopted constitution, these should not be infringed upon or disregarded by any statute which the Legislature might thereafter adopt.

This is the concept, I submit, which should determine the length of our Constitution. A constitution should be so constructed as to include all of the organic law and fundamental principles necessary to the orderly functioning of the government as a sovereign authority, without including detailed provisions which are the proper subject of statutory enactments to be adopted by the Legislature.

Having in mind this concept of a written constitution, certain broad general principles can be stated which which should govern the scope of its provisions.

First, a constitution should preserve to the individual citizen, singly and collectively, all of those personal liberties, the curtailment of which is not essential to the accomplishment of any objectives for which the government is being instituted.

Second, a constitution should insure to the sovereign all of the powers necessary to enable it to carry on the normal functions of government, to provide for the general welfare, and to protect the lives and property of the people subject to its jurisdiction.

Third, a constitution should establish, in such detail as may be necessary, the frame-work of government—the means by which and the limits within which the authority of the sovereign shall be exercised.

Fourth, a constitution should provide such restrictions and limitations upon the authority of the sovereign as will prevent the abuse by any branch of the government of any of the powers entrusted to it.

Fifth, a constitution should provide an amending procedure by means of which it can be kept abreast of the changing needs of the society upon which it operates.

The first of these principles is embodied in our traditional Bill of Rights and needs no explanation here, but I should like to skip over for the moment to the one last stated and elaborate at this point just a little further on the amending process, particularly as it operates with respect to our present Constitution.

Obviously, provision must be made for amending any Constitution in order, as I have just stated, that it may continue to provide for the changing needs of the society upon which it operates; and the amending process provided in our existing Constitution is by no means basically unsound. The plethora of amendments with which our present Constitution has become overburdened has resulted not so much from the amending procedure now in effect as from the extent to which as a state we have besome addicted to the amending habit.

Since the adoption of the Constitution of 1921, 347 different proposed amendments have been submitted and only 45, or about 13%, have failed of adoption. Out of the 19 elections at which amendments have been submitted, on 10 occasions every proposed amendment was ratified, including that of last fall when 34 such amendments were integrated into the text of the Constitution.

It is a matter of common knowledge that the adoption and ratification of constitutional amendments has come to be taken almost as a matter of course. For many proposed constitutional amendments receive the required 2/3 vote in the Legislature without the benefit of proper study by our lawmakers on the theory that their adoption by that body does not make them a part of our organic law but is only a submission to the voters; and the voters often times remain silent, or vote affirmatively on these proposals, on the theory that they have been studied and approved by those elected representatives and therefore can be

safely ratified. All too frequently, amendments to our Constitution are adopted which have not received thorough and thoughtful consideration at the hands of anyone other than their authors and sponsors.

This amending habit into which we have fallen also represents an extreme form of minority control. For example, in 1952 when 34 amendments were submitted, the number of registered voters who expressed an opinion on these amendments one way or the other ranged from less than 31% on Amendment No. 23 to approximately 37½% on Amendment No. 1. Amendment No. 1 was the Civil Service amendment which had received comparatively wide publicity, yet the number of votes cast on this issue represented only 3/8 of those qualified to vote and only 61½ of those who actually did vote in the presidential election. For another example, since any indebtedness secured by the full faith and credit of the state must be discharged out of funds derived from taxation, it would seem that any proposition to incur debt running into millions of dollars would merit an expression, pro or con, from a vast majority of the people affected. Yet a study recently made by the Public Affairs Research Council discloses that no amendment authorizing the incurring of state-wide debt has ever drawn as many as 50% of the registered voters, and in 1946 an amendement which authorized a 25 million dollar debt became effective with the approval of only 90% of the registered voters.

This indiscriminate resort to the amending process has made it possible to incorporate in our Constitution the mass of statutory material which I have already referred to, and the presence of that material in our organic law has in turn made necessary a more frequent resort to the amending process. Thus completing the well-known vicious circle.

All of this leads to the conclusion that in order to counteract our amending habit, some greater restraints should be placed upon the amending process than are provided in our present Constitution. For only by making the process more difficult can we hope to overcome the weakness which we have developed for constitutional amendments. The amending procedure should permit the incorporation in our Constitution of whatever change may be necessary in our organic law, but it should discourage the inclusion in the Constitution of statutory enactments which ought to be the responsibility of the Legislature alone.

This caveat with respect to the amending process is, I must

confess, more easily stated than carried out. And it is likewise true that a strict conformance to the other basic principles of constitutional draftsmanship which I have just stated is also not a simple matter. Their application in the preparation of a new constitution will involve the careful re-evaluation of many questions of policy which form the core of our political structure. It is not my purpose this afternoon to mention all, or even a substantial part, of the varied and complex problems with which the framers of a constitution will find themselves confronted, but it may not be out of order to examine a few of the features of our present organic law which might well be considered for revision.

The observations which I have made with respect to the amending process point up, as among the first of these questions, the need to place greater authority and responsibility in the hands of the Legislature. I am told by thoughtful members and former members of that body that it is frequently if not usually, easier to produce the passage of a proposed constitutional amendment than of a corresponding legislative act, since the Legislature's action on a statute is final and generates a greater sense of responsibility on the part of its members than is felt with regard to a proposed constitutional amendment, the final adoption of which, at least in theory, is left up to the will of the people. And this is true notwithstanding the fact that experience has shown that the ratification of proposed constitutional amendments by the voters is largely a routine affair and that only a small proportion of such proposals is rejected at the polls.

But the members of the Legislature are sincere men and women who are earnestly attempting to carry out their obligations to the people to the best of their abilities; and I am firmly convinced that if we will place squarely on their shoulders the constitutional authority and responsibility for enacting such laws, and only such laws, as are in the best interests of the state, and if we will provide a constitutional means by which they will have more time and opportunity to study and appraise the effect of the bills presented at any given session, a far more useful body of statutory law will result and less ill-considered material will be proposed for inclusion in the Constitution.

Another problem which will present itself is that of reapportionment. The senatorial districts, public service districts, the Supreme Court and Court of Appeal districts, and other geographical subdivisions where elective representation is based on

population, have not been kept in balance with the population changes which the state has undergone in the past 30 years. And the abortive attempts which have been made at various sessions of the Legislature to re-apportion the representation in that body have demonstrated that any general re-apportionment must await a constitutional revision in which provision should also perhaps be made for further re-opportionment to be effected at periodic intervals through an administrative rather than a legislative process.

Still another problem which might be mentioned is that of defining the areas of taxation from which are to be derived the revenues required to carry on state and local governmental functions. Whether or not the state should withdraw from the field of ad valorem taxation and leave that entirely in the hands of local governmental subdivisions is a matter for a constitutional convention to decide.

Other equally important questions of policy could be added to these particular examples, such as the whole question of the dedication of revenues to specific purposes, the extent to which administrative boards should b given constitutional sanction, or the desirability of providing for the selection of members of our judiciary through a procedure other than that of direct election. But these remarks represent no effort on my part to enumerate all the various problems which will demand consideration. As a matter of fact, there are no two individuals whose views will be in accord on the particular items which should be revised, but the gravity and complexity of the problems which I have suggested emphasize the importance of the task.

The Legislature of 1946 instructed the Louisiana State Law Institute to prepare the projet of a new constitution, and after 4 years of labor that body completed a proposed draft of such a document. The preparation of that projet represented the united efforts of many lawyers throughout the state and many experts on the various subjects with which a constitution must deal. In the course of its preparation numerous studies were made by the Institute's research staff relating to particular problems which were encountered, and several volumes of research material were assembled in connection with that work. The Institute makes no claim that the projet which it has prepared is *the* constitution which should be adopted for Louisiana. This projet does represent, however, *a* constitution, every provision of which has received thorough and thoughtful consideration and which can

well serve as a prototype for whatever final document may be decided upon. And the studies which have been made and which are available for the revisers' use will, it is believed, provide them with working tools such as have never before been made available for the fashioning of a constitution. It must be acknowledged, however, that tools alone are not sufficient to produce any finished article. The finest of precision instruments are of little value until placed in the hands of workmen who are familiar with their use. It is the skill of the artisan, rather than the quality of his tools, which distinguishes the finely finished and perfectly proportioned masterpiece of a Sheraton from the unimaginative and all-assembled imitation of a neighborhood carpenter.

So with the creation of a constitution. Its actual drafting must be done by earnest and conscientious workmen selected with the utmost care by the people whose interests will be most votally affected. Every laborer who is permitted to take part in that work should be chosen on the basis of worth alone. Neither his political affiliations nor his official status should otherwise entitle him to employment. The principle of a closed shop has no place in a constitutional convention. For in the last analysis we must recognize that the quality and the permanence of any constitution will be in direct proportion to the sincerity, the unselfishness, and the vision of those by whom it is prepared.

In this sense the enduring basis for revision must rest—the indispensable cornerstone for a sound and lasting constitution must be laid—in the hearts and minds of the delegates to whom the task of revision is entrusted.

It is we, the lawyers of the state, who are most vitally concerned in the problem of constitutional revision. It is we who must take th lead in bringing about such a result. The revision itself is a task which can not and should not be undertaken by any single individual or by any single class, group, or profession; but the need for revision should be most acutely apparent to members of the Bar, and we must assume the responsibility for making this need known to the people as a whole, and of building up a demand for remedial action in a volume that cannot be denied.

I sincerely urge that this Section of Judicial Administration, and every individual member present this afternoon, resolve to contribute his full share toward the accomplishment of that objective.

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Remarks By Judge Hardy on the Louisiana Constitution Draft of Call Adopted By Constitutional Committee

The Chairman of the Constitutional Convention Committee, Judge George W. Hardy, Jr., of Shreveport, recently addressed a meeting at the Tulane University College of Law.

Judge Hardy stated that a constitution is too often considered to be a legal document when in reality it is a political declaration of rights. For this reason we have the statement of personal rights and privileges in all constitutional documents, and, in addition, we have the restriction of all of the executive and legislative branches of government.

These latter cannot be effected without a delineation of the rights of the sovereign power, that is, the State, and, for this reason, we are impelled to assume a recognition of a preservation of rights to the individual and an assurance of power to the sovereign.

The present constitution of Louisiana fulfills none of the requisites of such a document because it is, or has been in the past, concerned with legislative detail and statutory provision. In the labyrinth and maze of this detail we have lost the purpose of the constitution.

The hope of the Bar Association is to promote a convention which will set up and adopt a true constitutional document. Inevitably this will deny the expression of individual rights and privileges because of the fact that it will be concerned with the rights of a whole rather than the rights of a group or an interest.

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Call For Constitutional Convention

Proposed by Constitutional Convention Committee

House Bill Number..... By Messrs.....

Providing for the holding of a constitutional convention subject to approval by a majority of the qualified electors voting at an election to be fixed and held for such purpose; to fix the basis of representation and apportionment of delegates; to prescribe the qualifications and method of election of delegates; to fix the time and the place of the holding of such convention; to provide for the compensation of delegates and the appropriation of funds in connection with the expense of such convention; to provide for the organization of the convention, the taking effect thereof and for a legislative session in connection therewith; to fix penalties for violations of the provisions of this Act for the holding of elections in connection herewith; and, generally, to make all pertinent provisions in accord with the general purposes hereof.

Be it enacted by the Legislature of Louisiana:

Section 1.

(1). That there shall be submitted to the qualified electors of the State of Louisiana at the general election for representatives to Congress to be held on Tuesday the 2nd day of November, 1954, a proposal to hold a convention for the purpose of framing and putting into effect a new constitution for the State of Louisiana, subject to the terms, conditions and provisions hereinafter set forth.

(2). The convention shall have the power to frame and adopt a new constitution for the State of Louisiana which will establish a framework of government.

(3). Said election, except as may be herein otherwise provided, shall be held under, and the results published and promulgated in accordance with the then existing general election laws of the State.

(4). All electors duly qualified at the time of the election shall be entitled to vote in their respective election precincts, and all electors favoring the proposal to hold a convention shall vote:

"For a constitutional convention to be held in accordance with Act No. ..... of 1954."

And all electors opposed to such proposition shall vote:

"Against a constitutional convention to be held in accordance with Act No..... of 1954."

The Secretary of State shall insert in the above spaces and in the ballots prepared in accordance with the above provisions the Act Number assigned to this bill in the event of its passage.

(5). The Governor shall make proclamation and give notice of the election to be held under this Act not less than thirty days before the date of said election as herein fixed.

Section 2.

(1). The convention shall consist of one hundred twenty delegates apportioned to the several parishes of the State on the basis of one delegate for every twenty-five thousand population or major fraction thereof, according to the Federal census of 1950; provided, however, that each parish of the State shall have a minimum of one delegate.

(2). In further elaboration of the representation fixed, it is provided that the representation by parishes be and it is hereby fixed as follows:

Acadia (2); Allen (1); Ascension (1); Assumption (1); Avoyelles (2); Beauregard (1); Bienville (1); Bossier (2); Caddo (7); Calcasieu (4); Caldwell (1); Cameron (1); Catahoula (1); Claiborne (1); Concordia (1); DeSoto (1); East Baton Rouge (6); East Carroll (1); East Feliciana (1); Evangeline (1); Franklin (1); Grant (1); Iberia (2); Iberville (1); Jackson (1); Jefferson (4); Jefferson Davis (1); Lafayette (2); Lafourche (2); LaSalle (1); Lincoln (1); Livingston (1); Madison (1); Morehouse (1); Natchitoches (2); Orleans (23); Ouachita (3); Plaquemines (1); Point Coupee (1); Rapides (4);

Red River (1); Richland (1);
Sabine (1); St. Bernard (1);
St. Charles (1); St. Helena (1);
St. James (1); St. John the Baptist (1);
St. Landry (3); St. Martin (1);
St. Mary (1); St. Tammany (1);
Tangipahoa (2); Tensas (1);
Terrebonne (2); Union (1);
Vermilion (1); Vernon (1);
Washington (2); Webster (1);
West Baton Rouge (1); West Carroll (1);
West Feliciana (1); Winn (1).

Section 3.

(1). Candidates for election as delegates shall qualify by filing statements of candidacy with the Secretary of State not later than the 10th day of September, 1954. In order to be eligible for election candidates must be qualified electors and must have been residents of the State of Louisiana for five years continuously preceding the date of qualification; of the parish from which they seek election for two years; and of the precinct in which they reside for six months. Qualifications for candidacy shall be without respect to party affiliation.

(2). Delegates shall be elected by a majority vote of the qualified electors participating in the elections for delegates as herein provided. Candidates receiving a majority vote in the first election and candidates who are unopposed shall be declared elected.

(3). In the event of the failure of any or all candidates from any parish to receive a majority vote in the election held on the 2nd day of November, 1954, a second election shall be held on the 7th day of December, 1954, at which election there shall be a sufficient number of candidates entitled to participate in said election so as to provide twice as many candidates as there are delegates yet to be elected, and no more. The selection of the candidates participating in said second election shall be made from those candidates in the first election who receive the two highest number of votes, the four highest number of votes, the six highest number of votes, and so on, until the required number shall be selected. If any candidate entitled to be voted for at the second election shall die or withdraw, the candidate who received the highest vote in the

first election shall be declared elected and only the names thereafter remaining shall be voted on.

(4). After the second election if it is found that a sufficient number of candidates to fill the office of delegates have failed to receive a majority of the votes cast, then, in addition to those candidates receiving a majority, a sufficient number shall be selected from the candidates receiving the highest votes.

(5). If more candidates receive a majority vote than there are delegates to be elected, those receiving the highest votes shall be declared elected.

(6). The returns of the elections herein provided shall be tabulated by the Secretary of State and promulgated in the official journal of the State within eight days after the date of each election.

(7). In the event of the death, inability or unwillingness of any delegate to serve, which event shall occur or be expressed either before or during the convention, the Governor shall fill such vacancy by the appointment of a person from the same parish possessing the qualifications hereinabove provided for delegates.

(8). Delegates from the Parish of Orleans shall be elected as follows:

From the five Councilmanic Districts in the City of New Orleans, as defined and outlined in the new City Charter of the City of New Orleans, which became effective May 1, 1954, four delegates will be elected from each of these five Councilmanic Districts with the remaining three delegates elected by the City of New Orleans at large. The candidates for election as delegates from each of the five Councilmanic Districts must be qualified electors, and must have been residents of the State of Louisiana for five years continuously preceding the date of qualification; of the Councilmanic District in which they seek election for two years and of the precinct in which they reside for six months. The candidates for election as delegates from the City of New Orleans at large must be qualified electors,

and must have been residents of the State of Louisiana for five years continuously preceding the date of qualification; of the Parish of Orleans for two years and of the precinct in which they reside for six months.

(9). Except as otherwise herein provided, the provisions of the general election laws of the State shall be applicable.

Section 4.

(1). In the event of the approval by a majority of the electors voting at the election above provided, the convention shall be convened in the chamber of the House of Representatives at the State Capitol in the City of Baton Rouge at 12:00 o'clock noon on Tuesday, the 4th day of January, 1955, and thence continue its sessions until the preparation of the new constitution shall be completed; provided, however, that the same shall be accomplished not later than April 15, 1955.

(2). The Chief Justice of the Supreme Court, or in the event of his inability to attend, any Associate Justice designated by said Court, shall attend the convention upon the opening thereof and shall preside as temporary president, without vote, until a President of the convention shall have been elected by vote of the delegates present. The Secretary of State shall attend the opening of said convention and call the roll of the delegates, whereupon the temporary president shall administer the following oath:

"I hereby solemnly swear that I will support the constitution and laws of the United States; that I will well and faithfully perform all duties as a member of this convention and that I will observe and obey the provisions of the Act under which the convention has assembled, So Help Me God."

No delegate shall be qualified to act unless and until he shall have taken and subscribed the said oath. Following the administering of the oath the delegates shall proceed to effect the permanent organization of the convention and to adopt rules governing its procedure, subject to the provisions hereinafter set forth.

(3). The delegates to said convention shall receive thirty dollars per diem, and ten cents per mile for

travel in connection with the work of the convention.

(4). The Legislature shall appropriate such funds as may be necessary to defray all of the expenses of the convention.

Section 5.

(1). Public officials of the State and its governmental subdivisions, whether holding office by election or appointment, if otherwise qualified shall be eligible for election as delegates to the convention and the election of any such official and his service in such convention shall not be construed to constitute dual office holding within the prohibition of the statutes of the State.

(2). Public officials elected as delegates to the convention be and they are hereby granted leave, with pay, from their official duties while in attendance upon the sessions of such convention and the work thereof.

(3). Any attorney at law who is elected and serving as a delegate to the said convention shall be entitled to the absolute right of the continuance of any case in which he is bona fide counsel of record, in any court of the state during his attendance upon the sessions and work of the convention.

Section 6.

(1). Following the opening of the convention and the taking of the oath by the delegates as herein provided, the convention shall immediately be organized as follows:

(a). There shall be elected by vote of a majority of the delegates present the following officers:

A President;
A First Vice-President;
A Second Vice-President;
A Third Vice-President;
A Fourth Vice-President.

(b). The duties of these officers shall be as follows:

The President shall preside at all sessions of the convention and in his absence or inability to serve, the Vice-President in the order of rank shal lserve in this capacity. The President shall appoint, by and with the consent of

the majority of the convention, seven working committees of the convention as follows:

1. A Committee on the Bill of Rights, Suffrage and Elections.
2. A Committee on the Legislature.
3. A Committee on the Judiciary.
4. A Committee on New Orleans and Local Government.
5. A Committee on Finance, Revenue and Taxation.
6. A Committee on the Executive Department and Education.
7. A Committee on Schedules and Miscellaneous Affairs.

Every delegates shall be a member of at least one of the working committees enumerated.

(c). The convention in its discretion may create other committees and all committees may establish sub-committees.

(2). The President and the Vice-President shall constitute a committee to be charged with the responsibility of employing and fixing the compensation of all employees necessary to the effective carrying out of the work of the convention and its committees, among whom shall be:

(a). The Secretary of the Convention.

(b). Such number of Assistant Secretaries as may be necessary.

(c). A Sergeant-at-Arms and assistants who shall be authorized to perform such duties as may be fixed, and execute such orders as may be directed by the presiding officer of the convention.

No appointive employee shall be a member of the convention.

(3). The First Vice-President shall be responsible to the convention for the direction of the secretariat and the office of the Sergeant-at-Arms.

(4). The Second Vice-President shall be responsible to the convention for the formulation of matters pertaining to Rules, Calendar and Research.

(5). The Third Vice-President shall be responsible to the convention for the Style and Revision of the work of the convention and its formulation into a completed document.

(6). The Fourth Vice-President shall be responsible to the convention for the preparation and formulation of a basis for legislative action necessary to put into effect the provisions of the constitution.

(7). The Louisiana State Law Institute is hereby designated as the official Research agency of the convention, provided, however, that the convention shall have the right to avail itself of the services of other agencies and expert assistance in the performance of its functions and the accomplishment of its purpose.

Section 7.

The new constitution as adopted by the convention shall take effect at such time, not later than six months following adjournment, as may be fixed by the convention.

Section 8.

All offenses, prosecutions, penalties and punishment as defined and set forth ni R.S. 18:560 *et seq.* shall apply to the elections provided for herein.

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Chicago Tribune

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The Dubious Origin of the Fourteenth Amendment

An address delivered by Walter J. Suthon, Jr. of New Orleans before the New Orleans Bar Association September 29, 1953

The Fourteenth Amendment to the Constitution of the United States has loomed large in recent years in litigations before the United States Supreme Court involving contentions for restriction of State regulatory power and enlargement of Federal regulatory power. Under this Amendment—and its companion, or statellite amendment, the Fifteenth—the United States Supreme Court, in the past approximately fifteen years, has repeatedly rendered decisions aimed at coercing racial integration and breaking down established systems of racial segregation in political, educational, social, economic and other fields in the Southern States—and in some instances outside the South.

It is not my purpose to discuss the merits of segregation—or of its antitype, racial integration. These are questions upon which each of us has his or her own individual view, belief, and conviction, based on what we think and how we think. What I shall discuss relates to the use of the Fourteenth Amendment by the United States Supreme Court as an implement for invading the areas formerly reserved to State regulation, or to individual or group action, and for breaking down established systems of racial segregation and setting up compulsive racial interassociation—in effect compulsive racial integration. In this field, the "equal protection of the laws" clause and the "privileges or immunities" clause of the Fourteenth Amendment are those most frequently invoked in support of these legal attacks upon our fundamental way of life.

There are now pending in the United States Supreme Court a group of cases involving attacks upon the constitutionality of our system of segregated public schools, and presenting demands that the segregation feature of this system shall be destroyed by judicial fiat. These cases seek the overruling of the established jurisprudence, predicated in a large measure upon a leading decions of the Supreme Court of Massachusetts (*Roberts v. City of Boston*, 5 Cush. (Mass.) 198), that a segregated system of public schools is constitutional, providing the educational facilities for each race are substantially equal.

The United States Supreme Court, after hearing arguments in these school segregation cases, and after several months of study and consideration following these arguments, has entered orders refixing these cases for further argument, now scheduled to take place in December. The orders for reargument specify certain issues on which the Court desires to hear discussion and to receive briefs. From this course of events, it appears quite possible that this Court is closely divided on these cases, and that the ultimate outcome may be determined by the presentation on reargument and in the additional briefs to be filed thereon.

The specifications of issues, on which discussion is requested at the reargument,, includes the following inquiries as to events contemporaneous with the framing, submission and ratification of the Amendment (73 S. Ct. Rep. 1114):

> "1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> "2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> "(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
>
> "(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?"

These specifications were probably prepared without any particular intent to invite exposure or discussion of the dubious origin of this Amendment. Be that is it may, they involve study, consideration and evaluation of the legislative history of the Amendment, and its dubious origin—one may justifiably say its worse than dubious origin—is an inseparable part of its malodorous legislative history.

As lawyers you of course know in a general way the procedure for amending the Constitution of the United States. However, I will read as follows the portion of Article V of the Constitution pertinent to the amendment machinery utilized in this instance:

"Article V. The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, * * * * * * * which * * * * *, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, * * * *."

As you will observe, this amending process is a two-step process. Congress takes the first step—submission—the next step—ratification—must be the act of the States—the act of at least three fourths of the States concurring in ratifications passed by their respective legislatures.

It is elementary that any consideration of an amendment proposal from Congress by a State legislature must involve equal freedom on the part of each State to ratify or reject, as its legislature in its deliberation and discretion may determine. The constitutional right and power of a State legislature to ratify carries with it, by necessary implication, an unquestioned and unfettered right and power to refuse to ratify.

In *Dillon v. Gloss*, 256 U. S. 368, 374, the view is expressed that action by the States, on ratification of a proposed constitutional amendment, through State legislatures as "representative assemblies," is an "expression of the people's will." Accordingly, any effort to coerce or manipulate action by a State legislature, on a constitutional amendment proposal, would be tantamount to tampering with the machinery by which the will of the people is expressed in a matter of grave importance. That is exactly what was done on a vast scale, by the dominant majority in Congress, in bringing about the ostensible ratification of the Fourteenth Amendment.

The Fourteenth Amendment was proposed by Congress to the States for adoption, through the enactment by Congress of Public Resolution No. 48 (14 Stat. L. 358), adopted by the Senate on June 8, 1866 (Cong. Globe, 39 Cong. 1st Sess. P. 3042) and by the House of Representatives on June 13, 1866 (Cong. Globe 39 Cong. 1st Sess. p. 3149). That Congress deliberately submitted this amendment proposal to the then existing legislatures of the several States is shown by the initial paragraph of the resolution reading as follows:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring) that the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-

fourths of said legislatures, shall be valid as part of the Constitution".

This submission was by a two-thirds vote of the quorum present in each House of Congress, and in that sense it compiled with Article V of the Constitution. However, the submission was by a "rump" Congress. Using the constitutional provision (Art. I. Sec. 5) that

> "Each House shall be the Judge of the Elections, Returns and qualifications of its own Members."

each House had excluded all persons appearing, with credentials as Senators or Representatives, from the ten Southern States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas and Texas. This exclusion, through the exercise of an unreviewable constitutional prerogative, constituted a gross violation of the essence of two other constitutional provisions, both intended to protect the rights of the States to representation in Congress. Article V states that

> "No State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Act I, Sec. 2, provides that

> "each State shall have at least one Representative"

Had these ten Southern States not been summarily denied their constitutional rights of representation in Congress, through the ruthless use of the power of each House to pass on the elections and qualifications of its members, this amendment proposal would doubtless have died a-borning. It obviously would have been impossible to secure a two-thirds vote for the submission of the proposed Fourteenth Amendment, particularly in the Senate, if the excluded members had been permitted to enter and to vote. Of course, that was one of the motives and reasons for this policy of ruthless exclusion.

Assuming the validity of the submission of this amendment by a two-thirds vote of this "rump" Congress, there is no gainsaying the obvious proposition that whatever "contemplation" or "understanding" this "rump" Congress may have had, as to the intent, or the scope, or the effect, or the consequences of the amendment being submitted, was necessarily a "rump" contemplation or understanding. The ten Southern States, whose Senators and Representatives were all excluded from the delibera-

tion of this "rump" Congress, could have had no possible part in the development or formation of any "contemplation" or "understanding" of what the consequence and effects of the proposed amendment were to be.

If the Supreme Court now finds that the Congress submitting the proposed Amendment understood and contemplated that it would abolish segregation in the public schools, either immediately or ultimately, one naturally wonders whether the Supreme Court will then enforce this necessarily "rump" contemplation or understanding against the ten Southern States who were deliberately and designedly excluded from any possible participation in these "rump" submission proceedings.

When the Fourteenth Amendment was submitted, these ten Southern States, which had been excluded from representation in Congress, had existing governments and legislatures. Congress had sought to avoid extending any recognition to these existing state governments, and the legality of these governments, in what the radical majority in Congress termed the "rebel States", was disputed in some quarters. However, in practically all of these ten States, these governments were the only governments then in existence and these legislatures, being the only legislatures then existing in these States, were in June, 1866, the only legislatures in these States to which the Fourteenth Amendment could be then submitted in these States under the directive in the proposal resolution that the amendment be submitted

"to the legislatures of the several States"

These State governments had received Presidential recognition and, through their legislatures, they had participated actively in the then recent ratification and adoption of the Thirteenth Amendment abolishing slavery. Indeed, ratification of that amendment by these legislatures in these Southern States had aided in making up the ratification of that amendment, abolishing slavery, by the required three-fourths of the States.

When the proposed Fourteenth Amendment was submitted to the legislatures of the several States, it needed to have ratification by twenty-seven States, being three-fourths of the thirty-six States. While it was ratified rather promptly by most of the States outside the South, it was rejected by the three border States of Kentucky, Delaware and Maryland. It was also rejected, during the latter part of 1866 and the early part of 1867,

by the legislatures of the ten Southern States, including Louisiana, whose Senators and Representatives had been excluded from seats in Congress.

This created a situation which made impossible the ratification of the Amendment unless some of these rejections were reversed. With thirty-six States in all, ten rejections were sufficient to prevent the adoption of the amendment proposal. The thirteen rejections, by the ten Southern States and three border States, were more than sufficient to block ratification even if all other States finally ratified.

The Louisiana legislature, which rejected the Fourteenth Amendment early in 1867, had been elected under the Louisiana Constitution of 1864, and functioned under this Constitution. It should be remembered that this Constitution was not a product of the Confederacy, or of a reorganization of the State Government by former Confederates after cessation of hostilities. The Louisiana Constitution of 1864 was adopted by a Convention held in New Orleans under the auspices of the Federal authorities, acting largely on suggestions and directions from President Lincoln. It was clearly a re-establishment and continuation of the Louisiana State Government as it had existed before Secession.

The rejection of the Fourteenth Amendment by this Louisiana Legislature is embodied in Act 4 of 1867, a Joint Resolution adopted by both Houses declaring

> "That the State of Louisiana refuses to accede to the amendment of the Constitution of the United States proposed as Article (XIV) fourteen."

This is the only action ever taken on the Fourteenth Amendment by a Louisiana Legislature exercising free and unfettered and uncoerced judgment and discretion as between ratification or rejection of the amendment proposal. The subsequent purported ratification of this Amendment in Louisiana was by a legislature of a puppet government, created by the radical majority of Congress to do the bidding of its master, and compelled to ratify this Amendment by the Federal Statute which had brought this puppet government into existence for this specific purpose.

It is most interesting to read, in the 1867 Journal of the Louisiana House of Representatives (P. 24), the proceedings on February 6, 1867, whereby that body adopted the Joint Resolu-

tion ordaining the refusal of Louisiana to ratify the proposed Fourteenth Amendment—the Joint Resolution which became Act 4 of 1867. This Journal shows, by the roll call, that one hundred members voted out of a total House membership of one hundred and ten—and that the unanimous vote was one hundred against ratification and none in favor of it. This was the last opportunity for a free and uncoerced expression of views on this amendment proposal by the duly elected representatives of the people of Louisiana.

The scene shifts back to Washington. The Radicals have a majority, by over a two-thirds vote, in the "Rump" Congress from which all representation of the ten Southern States is excluded. They accomplish the passage of the Reconstruction Act of March 2, 1867 (Ch. 153, 14 Stat. L. 428). This Act had, as one of its major objectives, the attainment of ultimate ratification of the Fourteenth Amendment, through compelling and coercing ratification by the ten Southern States which had rejected it.

The Act dealt with these ten Southern States, referred to as "rebel States" in its various provisions. It opened with a recital that "no legal State government" existed in these States. It placed these States under military rule. Louisiana and Texas were grouped together as the Fifth Military District, and placed under the domination of an army officer appointed by the President. All civilian authorities were placed under the dominant authority of the military government.

This Act, as supplemented by subsequent amendments, completely deprived these States of all their powers of government and autonomy, until such time as Congress should approve the form of a reorganized state government, conforming to rigid and extreme specifications set out in the Act, and should have recognized the States as again entitled to representation in Congress.

The most extreme and amazing feature of the Act was the requirement that each excluded State must ratify the Fourteenth Amendment, in order to again enjoy the status and rights of a State, including representation in Congress. I quote from Section 3 of the Act the following statement of this compulsive coercion thus imposed upon the Southern States:

> * * * * * and when said State, by a vote of its legislature elected under said constitution,

> shall have adopted the amendment to the Constitution of the United States, proposed by the thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, * * *"

The most apt characterization of this compulsive provision, placing these States under military authority, there to remain until they compiled *inter alia* with this requirement, of ratifying the rejected Fourteenth Amendment, is found in a speech by Senator Doolittle of Wisconsin, a Northerner and a Conservative Republican. During the floor debate on the bill, he said (Cong. Globe, 39 Cong. 2nd Sess., Part III, P. 1644):

> "My friend has said what has been said all around me, what is said every day: the people of the South have rejected the constitutional amendment, and therefore we will march upon them and force them to adopt it at the point of the bayonet, and establish military power over them until they do adopt it."

Surely, the authors of our Constitution never contemplated or understood that ratification of a constitutional amendment proposal by a State could lawfully be compelled "at the point of the bayonet," and by subjecting all aspects of civil life in the recalcitrant State to continued military rule, until this State recanted its heresy in rejecting the proposed amendment, and yielded the desired ratification to the duress of continued and compelling force.

President Johnson vetoed the Reconstruction Act in an able message, stressing its harsh injustices and its many aspects of obvious unconstitutionality (Cong. Globe, 39 Cong. 2nd Sess., Part III, pp. 1729-1732, 1969-1972). He justifiably denounced it as

> "a bill of attainder against nine million people at once".

Notwithstanding this able message, the Act was promptly passed over his veto by the required two-thirds majority in each House. Military rule took over in the ten Southern States, to initiate the process of conditioning a subjugated people to an ultimate acceptance of the Fourteenth Amendment.

Relief from the oppressive and unconstitutional features of the Reconstruction Act was sought in vain in the Courts. Three times the Supreme Court found some reason for not deciding these constitutional issues. Unlike the present Court, which was quick to protect three minor government officials against salary-blocking legislation by Congress, interpreted as constituting a bill of attainder against these individuals (*United States v. Lovett,* 328 U. S. 303), the Court of 1867-1868 seemed to feel no urge to review the constitutional merits of the solemn charge of President Johnson that the Reconstruction Act constituted a bill of attainder against nine million people. This is all more amazing since the two leading precedents on the enforcement of the constitutional prohibition of bills of attainder, cited and followed in *United States v. Lovett,* were decisions of the Court of 1867-1868—*Cummings v. Missouri,* 4 Wall. 277, *Ex Parte Garland,* 4 Wall. 333.

The decisions wherein grounds were found for avoiding a ruling on the constitutionality of the Reconstruction Act leave the impression that our highest tribunal failed in these cases to measure up to the standard of the judiciary in a constitutional democracy. If the Reconstruction Act was unconstitutional, the people oppressed by it were entitled to protection by the judiciary against such unconstitutional oppression.

In *Mississippi v. Johnson,* 4 Wall. 475, the Court expressed definite apprehension that an injunction against the execution of the Reconstruction Act by the President, on grounds of unconstitutionality, might result in Congressional impeachment of the President for obeying the mandate of the Court (PP. 500-501).

In *Georgia v. Stanton,* 6 Wall. 50, the Court declined to entertain a suit assailing the constitutionality of the Reconstruction Act, on the ground that the issues raised were political and not justiciable. The opinion frankly describes in the following language the issues as to which the Court held that a State is without any protection in a court of law (P.76):

"* * * we are called upon to restrain the defendants, who represent the executive authority of the govern-

ment, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained."

In *Ex Parte McCardle*, 6 Wall. 318, 7 Wall 506, the Court permitted Congress to evade a judicial determination of the constitutionality of the Reconstruction Act, by repealing a statutory provision as to appellate jurisdiction after the appeal had been lodged, and even after the case had been argued and submitted for decision. Again the opinion leaves the impression that the Court preferred not to be obliged to pass on the merits of the constitutional issue.

As a result of these decisions, enforcement of the Reconstruction Act against the Southern States, helpless to resist military rule without the aid of the judiciary, went forward unhampered. Puppet governments were founded in these various states under military auspices. Through these means, the adoption of new State Constitutions, conforming to the requirements of Congress, was accomplished. Likewise, one by one, these puppet state governments ratified the Fourteenth Amendment, which their more independent predecessors had rejected. Finally, in July 1868, the ratifications of this amendment by the puppet governments of seven of the ten Southern States, including Louisiana, gave more than the required ratification by three-fourths of the States, and resulted in a Joint Resolution adopted by Congress and a Proclamation by the Secretary of State, both declaring the Amendment ratified and in force.

It is interesting to speculate upon what might have been the course of events, if our Supreme Court of 1867-1868 had met these charges of unconstitutional action, in the enactment and enforcement of the Reconstruction Act, in the direct manner which characterized the judicial performance of the Supreme Court of the Union of South Africa in the recent "Colored Vote Case." The Malan Government had enacted certain legislation restricting the rights of colored voters, which clashed with the assertedly "entrenched clauses" of the Constitution of South Africa. Twice the case went to the Supreme Court of South Africa, and twice that Court upheld the constitution on the merits

of the issues and pronounced the unconstitutionality of the offending legislation. For this fine judicial work, it has been highly commended by the Harvard Law Review; see 65 Harvard Law Review 1361; 66 Harvard Law Review 864.

When *Georgia v. Stanton* is compared with the recent South African decisions, one cannot escape the impression that the difference between the cases is the difference between meeting and evading (even though the evasion be perhaps unconscious) an issue which ought to be met and decided.

The supposed constitutional justification of the Reconstruction Act, most frequently asserted by its supporters, was the view that such legislation would come within the power of Congress under the guarantee of "a republican form of government" to each State by the United States, contained in Article IV, Section 4, of the Constitution.

Whatever justification for other portions of the Reconstruction Act may or may not be found in this constitutional provision, there could clearly be no sort of a relationship between a guarantee to a State of "a republican form of government" and an abrogation of the basic and constitutional right of a State, in its legislative discretion, to make its own choice between ratification or rejection of a constitutional amendment proposal submitted to the state legislatures by the Congress of the United States. To deny to a State the exercise of this free choice between ratification and rejection, and to put the harshest sort of coercive pressure upon a State to compel ratification, was clearly a gross infraction—not an effectuation—of the constitutional guarantee of "a republican form of government."

Beyond this, the whole idea that Article IV, Section 4, could confer upon Congress power to alter the governmental structure of a State—particularly a governmental structure of the general type existing in the thirteen original States at the time of the adoption of the Constitution—has been most effectively refuted by the authoritative commentary of James Madison. Writing in *The Federalist,* No. 43, Madison poses the following questions respecting the provision for a guarantee to each State of "a republican form of government":

> "It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves."

He then proceeds to give his answers to these questions, and his significant answer to his second question reads as follows:

> "To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a preexisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

Elsewhere in the same number of *The Federalist*, Madison reiterates in the following language his basic concept that Article IV, Section 4, unquestionably recognizes the then existing state governments as republican in form, and protects them against innovations or changes of a non-republican character:

> "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained."

It is interesting to note that the Supreme Court, in *Minor v. Happersett*, 21 Wall. 162, enunciated a doctrine in complete accord with Madisonian ideology that the type of government, existing in the original States when the Constitution was adopted, established a standard for the meaning of the term "republican form of government" in this constitutional provision (p. 175):

> "The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

> The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution."

These indications of the difficulties which the proponents of the Reconstruction Act would have encountered, in defending the constitutionality of that enactment at a trial of the merits of that issue, demonstrate that the leaders of that faction were shrewd and smart in making every effort to avoid a judicial determination of that issue.

The enactment of the legislature of the puppet government of Louisiana which ratified the Fourteenth Amendment, is embodied in Act 2 of 1868. The legislative journals of that session reflect the presence and the dominance of the military, all as provided for and contemplated by the Reconstruction Act.

The House Journal shows (P. 1) that on June 29, 1868, Colonel Batchelder opened the session by calling the roll and reading an extract from the order of General Grant. The Senate Journal for the same date (P. 1) shows the reading of instructions from General Grant to the Commanding Officer of the Fifth Military District emphasizing the supremacy of the power of the military over the provisional civilian government. It was under these auspices that the coerced ratification of the Fourteenth Amendment in Louisiana was accomplished.

Even under the puppet government, created in Louisiana pursuant to the Reconstruction Act, the ratification of the Fourteenth Amendment in Louisiana was not unanimous. In the Senate on July 9, 1868 (Senate Journal, pp. 20-21), the vote on ratification was twenty yeas and eleven nays. The record contains a protest by Senator Bacon against voting upon ratification "under duress" imposed by the Reconstruction Act, and an unavailing appeal by that legislator for an opportunity for a "free and unrestrained" vote.

The fact that ratification in the Southern States came finally, as a coerced result, through the legislatures of the puppet

governments created by the Reconstruction Act, after rejection of the amendment by the prior State legislatures, can pose a very serious question in relation to one of the issues upon which the Supreme Court invited discussion of the reargument. I refer of course to the request by the Court for discussion of what understanding or contemplation of the scope of the amendment was had by the State legislatures which ratified it.

Such an inquiry may be proper as to a legislature which, free to ratify or reject, determined of its own volition to ratify. But to give effect, as against the Southern States now, to whatever extreme and sweeping notions of the broad scope of the Fourteenth Amendment may have been expressed by the puppet legislators, who used their power under the Reconstruction Act to vote in favor of ratification States really opposed to ratification, would be a perversion of history and a contradiction of plain fact.

Even if plain coercion, under the Reconstruction Act, be not regarded as nullifying the ratification votes of the Southern States, recorded by puppet legislators obeying the orders of their masters, these puppet legislatures have no power to speak on matters of legislative intent, *ex post facto*, for the States which they misrepresented in voting for ratification. These States, as soon as they were free of Federal coercion, repudiated and disestablished these puppet governments, and all that went with them.

An article under the same title, being a revision and amplification of the material contained in this address, will be published in the next issue of the Tulane Law Review, Vol. 28, No. 1.

"TIME IS OF THE ESSENCE"

While this is an important principle in certain types of contractual cases, this phrase may be of extreme importance to the lawyer in his every day practice, i. e., in the preparation and printing of a brief.

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A Message From The President

By Richard B. Montgomery, Jr.

This is the second issue of our new journal. I desire to call the membership's attention to the fact that the editors are now publishing a paper delivered by Dr. Joseph Dainow, at the Section of International Law, in Alexandria. In the last issue we published a paper in favor of the American Bar Association's Bricker Amendment by Eberhard P. Deutsch. This paper opposes the passage of the amendment. I think that our journal is making a very fine decision. The Bar Association, at its annual meeting in Shreveport in 1951, and in Alexandria in 1952, adopted resolutions supporting the amendment. Regardless of that fact, the editors believe that the bar journal should be open to a complete discussion on each and every issue involving the members of the Louisiana Bar. I think they should be commended, and I hope the journal will adopt for its policy, Voltaire's statement in his letter to Madame du Dessand:

> "I disapprove of what you say, but I will defend to the death your right to say it."

Bar Association Convention

It is most important and necessary that the members realize that the Convention this year is going to be and must be held on an entirely different basis than ever before. The following having been appointed members of a Convention Committee:

Thomas W. Leigh	Robert E. LeCorgne, Jr.
John Pat Little	Ralph H. Fishman
William A. West, Jr.	Travis Oliver, Jr.
Thomas M. Hayes, Jr.	Clarence L. Yancey
James A. Van Hook	Ashton L. Stewart
Fred A. Blanche	Ben R. Miller
G. William Swift, Jr.	Samuel W. Plauche, Jr.
Donald Labbe	James J. Davidson, Jr.
Nauman S. Scott	D. Cameron Murchison

Because of the fact that no local bar association is sponsoring the convention, the cost must be borne by the members individually. Therefore, it has been decided by the Board of Governors that all reservations are to be filled upon the basis of the date of receipt, and that all reservations must be sent to the Secretary's office accompanied by a check for $15.00. PLEASE COOPERATE BY MAKING YOUR RESERVATION EARLY.

Report of Constitutional Convention Committee

In this issue of the journal, the call for a Constitutional Convention for the State of Louisiana, as prepared by the Committee created by the last convention, is published. This committtee consists of the following personnel:

Judge George W. Hardy, Jr., Chairman

Howard W. Lenfant	Ben R. Miller
Robert A. Ainsworth, Jr.	LeDoux Provosty
Alvin O. King	George T. Madison
John H. Tucker, Jr.	Harry V. Booth
Fred G. Hudson, Jr.	Camille F. Gravel, Jr.

Oliver Stockwell

They have worked long and hard and have held numerous meetings. In my opinion they should be congratulated upon this report. However, there are some questions which still worry members of the bar, and I am calling them to your attention so that you may write to the Board of Governors. This report has not been officially approved at a meeting of the Board of Governors, but has the unofficial approval of the vast majority of its members. The Board will meet December 5th and they solicit suggestions. The questions which the members of the bar should consider are:

1. Whether or not the call for the convention should contain restrictions or prohibitions on the right of the convention to adopt a constitution.

2. Whether there should be delegates appointed to the convention.

3. Whether or not the call itself should require that the convention submit the constitution it has prepared to the people after it has been prepared.

The committee discussed these questions exhaustively and came to the conclusion that all should be decided in the negative.

Bar Sponsored Insurance Program

A little over a year ago, through its Board of Governors, the Louisiana State Bar approved and sponsored a Group Accident & Health Insurance Program with the Metropolitan Casu-

alty Company of New York. This coverage cannot be obtained by any lawyer individually. It is a fine bar effort to sponsor a plan by which lawyers who cannot set up pension trusts or come under social security can help themselves through voluntary cooperation. This plan is different from the ordinary policy. It provides for coverage up to 70 years of age and for five years' sickness coverage at a very reduced cost. You will find an advertisement by Curtis Reed Insurance in this issue of the journal. It is essential that over 50% of the members subscribe to this plan in order to keep it in force, and I certainly hope that each lawyer will investigate this policy.

Proposed Increase in Dues

The Association with the publication of the new journal and a renewed interest by its committees is spending more money than it is receiving. The dues of the Association are:

Active members admitted to practice of law in Louisiana for more than three years..... $10.00

Less than three years..... 3.00

It is, in my opinion, impossible to run an integrated bar and render to the lawyers the services that are necessary for their preservation on the basis of this assessment. I am, therefore, suggesting that at the next convention the dues of members admitted to practice for more than three years be increased to $15.00.

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Bar Notes

The Tulane University held its third annual Tax Institute sponsored by the Schools of Law and Business Administration, November 18, 19 and 20, 1953, at the St. Charles Hotel.

A program of nationally known authorities in the tax field addressed the Institute.

The Legislative Process Committee of the Legislative Council met in New Orleans on November 12, 1953, at the Chamber of Commerce Building. The session was sponsored by the New Orleans Legislative Committee of the New Orleans Bar Association.

The Law School of Louisiana State University has announced that its second annual Institute on Mineral Law will be held at the Law Building, Louisiana State University, on Friday and Saturday, February 12 and 13, 1954. Detailed announcements giving the program of the meeting will be forwarded at a later date to each member of the Louisiana State Bar Association. Last year's Institute was attended by some 225 lawyers. A limited number of the printed proceedings of last year's addresses and papers are available at $3.75 per copy. Orders should be placed with the Louisiana State University Law School.

The International Congress on Civil Procedure met in Vienna, Austria, October 5 through 8, 1953, and heard a paper written by Henry G. McMahon, professor of law at Louisiana State University, on the revision of the Louisiana code of practice.

A professional study program for practicing attorneys has been established in the Tulane University school of law, Dr. Rufus G. Harris, president, has announced.

In the program, certain courses in the regular law cirriculum will be available to Deep South attorneys.

Cecil E. Ramey, Jr., assistant professor of law, is program director. Courses in gift and estate taxation and workmen's compensation will be offered this fall. Both courses are offered evenings and students will be drawn from both the practicing attorneys and full-time enrollees.

In compliance with bar association regulations, neither examinations nor credit will be taken for the courses by practicing attorneys.

The program will provide an opportunity for lawyers to refresh their knowledge in familiar fields and to keep abreast of new or changing areas of law on the broad and substantial level offered by the regular law school course.

Shepard's Citations announces that it is celebrating its 80th Anniversary in the publication of its well-known works "Shepard's Citations."

This service began in 1873 when Frank Shepard provided attorneys in Chicago with a case citation service. These services have now been increased to meet the requirements of every jurisdiction throughout the United States. To commemorate its 80th Anniversary, Shepard's has published a booklet entitled "Four Score Years of Service to the Legal Profession" and will gladly send a copy to anyone upon request.

On Tuesday, December 15, 1953, from 7:30 to 9:30 P. M. The Tulane School of Law will conduct a forum on "Problems Arising from the Use of Pre-trial Conferences and Discovery."

This meeting is a part of the Tulane Program of Professional Study and will be opened to all members of the Bar without charge.

Members of the Panel will include Chief Justice John B. Fournet, of Louisiana Supreme Court, Judge Louis H. Yarrut and Judge Rene A. Viosca of the Civil District Court for the Parish of Orleans, Professor Leon Sarpy of the Loyola School

of Law, and Professor Leon D. Hubert, Jr., of the Tulane School of Law.

In order to make the affair of maximum benefit to the Bar, the School is asking interested attorneys to do two things: (1) Outline briefly any problems they may have faced in the use of pre-trial conferences and discovery and mail them, at their earliest convenience to Professor Cecil E. Ramey, Jr., Tulane Program of Professional Study, Tulane Law School, New Orleans 18, Louisiana. (2) All those interested in attending so indicate to Professor Ramey at the earliest time.

The Junior Bar Section of the Louisiana State Bar Association met in Baton Rouge on October 31, 1953.

Reports were heard from the various districts concerning the organizational activities in their respective districts.

All members of the Junior Bar Section were urged to attend the Junior Bar Conference in Atlanta, March 4, 1954.

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The Revision of Probate Procedure in Louisiana

Delivered by Henry G. McMahon, Professor of Law, Louisiana State University; Coordinator and Reporter, Code of Practice Revision, Louisiana State Law Institute, before Section of Trust Estates, Probate and Immovable Property Law, Alexandria, April 24, 1953

In 1948, the Legislature of Louisiana directed the Louisiana State Law Institute "to prepare comprehensive [*projets*] for the revision of the Civil Code of Louisiana and for the revision of the Code of Practice of Louisiana." At that time, all of the energies of the Law Institute were being channeled into the completion of the *projet* of the Louisiana Revised Statutes of 1950. Upon the adoption of the latter in 1950, immediate consideration was given by the Law Institute to the revision of the two codes of Louisiana called for by the legislative mandate. It was thought that work on the Civil Code revision would require more than fifteen years, but that the draft of a new Code of Practice might be completed within the next four or five years. For that reason, the procedural code revision was given priority, and the necessary machinery, organization, and procedures for such revision were established as soon as possible. Actual work on the new Code of Practice commenced during the latter part of 1950.

This work has been proceeding steadily, and since the fall of 1951 the great majority of the working time of the Council of the Law Institute has been devoted to the study of the drafts of proposed articles in the various titles of the new procedural code. These drafts reach the Council only after preliminary study and redrafting by the Reporters, the Advisory Committee, and the Judicial Liaison Committee. At present, it is estimated that well over half of the work of revision of the Code of Practice has now been completed, and it is contemplated that, if the present rate of progress can be maintained, the entire project can be completed during the spring or summer of 1955.

One of the most important parts of the new procedural code will be Book VI, dealing with the subject of Probate Procedure. Although actual work on this portion of the new Code of Practice is not scheduled to begin until the early fall of this year,

because of the importance of the subject and the difficulty of the numerous problems to be encountered therein, considerable thought as to the planning of work thereon has been given by the three Reporters and the officers of the Law Institute. In view of the peculiar nature of this work, it is contemplated that a number of the abler and more experienced probate lawyers of Louisiana will be invited to serve on a Special Committee on Probate Procedure, so as to bring to the assistance of the Reporters and the Council of the Law Institute all of the knowledge and experience of the best talent on the subject available in this State. It is further contemplated that, as far as practicable, membership on this special committee will be distributed geographically, so that differences in local customs and practices will be brought to the attention of the Law Institute, in order that these may be reconciled or adjusted in reaching the necessary uniformity of probate procedure throughout Louisiana.

In all probability, there is a greater need for the revision of our probate procedure than of any other segment of our adjective law. Duplicate provisions in both the Civil Code and the Code of Practice in large measure constitute unnecessary repetition; but in a few instances the difference in the language of the pertinent articles in the two codes has led to construction and interpretation which can easily be eliminated through the draft of the new procedural code.

Perhaps the greatest criticism which can be levelled at the provisions of both the Civil Code and the Code of Practice on succession procedure is that, while these articles are still representative of our legal theory, the approach to the subject is completely unrealistic and confusing. This makes it impossible for judges and lawyers from other states, and even law students in Louisiana, to glean anything more than the scantiest knowledge of our probate procedure from the provisions of our two codes. How vivid are the recollections of the bewilderment and frustration of our student days when, after learning quite early that vacant successions were then practically non-existent, we studied article after article relating to the powers and duties of curators of vacant estates and the procedure of handling vacant successions. This bewilderment and frustration were not completely dispelled by the code cross-references informing us that these provisions governed, so far as practicable, the powers and duties of administrators and executors and the procedure for their administration of successions.

Some of the most important features of our probate procedure find no foundation or express authority in the language of any code or statutory provision. These, in all probability, can be traced back to no more legitimate an ancestry than those provisions of Spanish procedure which were attempted to be nullified by the great repealing act of 1828. Where, in our code provisions or statutory law, can we find authority for the submission of proof as to the decedent's death, domicile and heirship through the affidavits of "two good and credible witnesses"? The explanation that it probably is one of the remaining vestiges of the proof and half-proof of Spanish procedural law may be quite interesting, but it hardly can be said to offer as convicing authority for its present-day use as might be desired.

Where in our code provisions and statutes can we find express authority for the judgment of possession rendered on the ex parte application of heirs willing to accept the succession purely, simply, and unconditionally? Where in our positive law do we find express recognition of the effect of such a judgment of possession as constituting prima facie proof of heirship?

How often have members of the legal profession in Louisiana had the difficult task of attempting to convince the attorneys for a federal agency, or a trust company or corporate transfer agent in another state, of the authority for and the effect of an unconditional judgment of possession, when no administration of the succession has been deemed necessary? The three statutes permitting banks, and corporations, and homestead associations to surrender funds or other property to the heirs recognized by the judgment, or to transfer shares of stock standing in decedent's name to such heirs, offer little assistance here. While they clearly provide protection to the corporations relying upon the judgment of possession rendered by a court of competent jurisdiction, they do not touch upon the crucial question of when can the administration of a succession be dispensed with in Louisiana.

Certainly, our new probate procedure should be expressly declaratory of the probate practices which are to be followed in this state in the future.

What, then, should be the prime objectives of this important and badly-needed revision of our probate procedure? The Reporters believe that these objectives should be four-fold. Three of these immediately suggest themselves and may be disposed of at the outset. *Firstly*, to have the articles of this book of the new

Code of Practice declaratory of the probate practices to be followed in Louisiana in the future. *Secondly,* to simplify and streamline our probate procedure so as to obtain the most expeditious and the most economical disposition of succession matters consistent with the protection of the rights of all persons to be affected thereby. *Thirdly,* to integrate into the new Code of Practice—and into the new Code of Practice exclusively—all of the probate procedure of Louisiana, including pertinent articles of the Civil Code and those most important special statutes now incorporated into Title 9 of the Revised Statutes of 1950, "Civil Code Ancillaries".

Fourthly, and equally important as any of the objectives previously stated, is the necessity of expanding our probate procedure to meet the needs of the rapid economic development of Louisiana, and those of changing conditions brought about by new social and economic practices and policies. Our succession procedure must not be permitted to brake the momentum of the development of our substantive law. For reasons of economic utility, we have recently borrowed the concept of the trust from the equity jurisprudence of our sister states. Our probate procedure must be designed to implement, rather than obtruct, the creation of trusts and other modern methods of estate planning now in use throughout the country. It must be sufficiently flexible and expeditious to permit our banks and trust companies to compete with similar institutions in other states. Recent sharp increases in income taxation have materially reduced the advantages of corporate ownership and operation of small businesses, and have revived to a considerable extent individual, and to a lesser extent partnership, ownership and operation. The probate procedure which we adopt must be effective in permitting an orderly transition of such businesses from the ownership of decedent to that of the heirs, without the liquidation which only too often has been the effect of the limitations of our present procedure. Our future ancillary probate procedure must serve to encourage, rather than discourage, the flow of capital into Louisiana from other states.

In the work of drafting the new Code of Practice, the Law Institute has borrowed freely from other procedural systems. The Federal Rules, the new Italian Code of Civil Procedure, and the newer procedural codes of civilian jurisdictions all are making effective contributions to Louisiana's new Code of Practice. We need offer no apology for these borrowings. The real justifi-

cations for comparative law are the opportunities offered for profiting from the experience of other jurisdictions, and the possibilities of improving one's own system of law through the adoption of the most workable concepts and devices of competing systems.

In the contemplated expansion of our succession procedure, it seems clear that we should examine very carefully the probate procedure of our sister states, which was designed to provide effective solutions of the identical problems which we will face in the future, and adopted with identical objectives in mind. In the implementation of trusts and other modern devices of estate planning, succession procedures of the continent and other civilian jurisdictions have relatively little to offer.

The most advanced, and the most carefully planned and drafted, potential legislation on the subject is provided by the Model Probate Code. This work, drafted at the University of Michigan Law School in cooperation with the Committee on Model Probate Code of the Probate Law Division, Section of Real Property, Probate and Trust Law of the American Bar Association, is the fruitful product of more than five years of intensive research, study, and draftsmanship. It followed in the wake of, and profited immensely from, the wave of probate reform which made itself evident in a number of American states during the preceding two decades. The Model Probate Code has accepted and incorporated the relevant proposed uniform acts drafted by the National Conference of Uniform State Laws covering various aspects of probate law and procedure. It reflects the advances made in probate law throughout the country in recent years.

The Model Probate Code was never intended to be a uniform code. The draftsmen realized only too well that local differences and variances made the adoption of a uniform code extremely difficult. It was designed as a model code, to make available to legislative committees, bar association committees, and other professional groups charged with the duty of drafting needed probate legislation, the full benefit of the thought, study, and recommendations of the extremely able group which had drafted the Model Code. As the American Bar Association Committee said in its report to the Section, it was believed "that either as a code complete in itself, or as a fundamental probate law on which to build a larger legislative superstructure, it can

be recommended without qualification to the legislative authorities of any jurisdiction in which probate reform is sought."

Both substantive and procedural law principles are included in the Model Probate Code. The substantive rules of law incorporated therein cannot be considered as available to the Law Institute in the drafting of our Code of Practice for two reasons. Firstly, under our legislative mandate we are limited presently to a recodification of our procedural law. Secondly, and more importantly, the substantive rules of law included in the Model Probate Code are bottomed upon common law concepts and principles which probably cannot be considered even in the recodification of our substantive law. Whatever criticism members of the legal profession in this state may have voiced with respect to various principles and results in other fields, the Reporters and the Council of the Law Institute are unaware of any demand for the discarding of our time-honored, civilian principles of universal succession, forced heirship, and community property.

Not all of the procedural provisions of the Model Probate Code would offer assistance to any professional group drafting the new succession procedure of Louisiana. For instance, one of the most difficult problems which the Model Probate Code affords a solution of is that related to the jurisdiction of probate courts, and which is attributable to the fact that in a number of states the trial courts of general jurisdiction do not have probate jurisdiction. The latter is possessed exclusively by completely separate probate courts. Hence, in these states difficult questions as to which of these two systems of courts has jurisdiction to try matters falling within the jurisdictional penumbra zone are constantly presenting themselves. The Model Probate Code has gone far towards effecting a solution of these difficulties through an admirable definition of the jurisdiction of probate courts. Most fortunately for Louisiana, this jurisdictional problem ceased to exist in 1879, when, under the Constitution of that year, parish courts were abolished and probate jurisdiction was conferred upon our trial courts of general jurisdiction—the district courts.

However, a number of the procedural sections of the Model Probate Code, offering effective solutions of many of the problems which are either identical with or similar to those which we will face in Louisiana in the future, are well worthy of the closest study and consideration by the Law Institute in connec-

tion with the drafting of the title on Probate Procedure of our new Code of Practice. Though limitations of time prevent consideration of all of these sections of the Model Probate Code which do or may offer such assistance, solely for the purposes of illustration the writer would like to discuss briefly just a few of the problems which present themselves, and for which workable solutions may be offered by sections of the Model Code.

1. *Venue of Successions.* Prior to 1952, both of the applicable code provisions concerning the place where successions were to be opened were declaratory of the traditionally civilian order for the determination of jurisdiction: (1) parish of decedent's domicile; (2) if no domicile in this state, the parish where the principal immovable property of decedent was situated; and (3) if no domicile or immovable property, then in the parish where the decedent died. In an age when the principal form of wealth was immovable property, these provisions appear to have worked well. In view of the ever-increasing importance of corporate stock, bonds, trust funds, and bank deposits as forms of investment, however, the code provisions fail to provide completely workable solutions in all cases, such as a nonresident dying in another state but leaving considerable items of movable property in Louisiana.

For this reason, upon the request of the New Orleans Chamber of Commerce, initiated at the instance of the New Orleans banks and trust companies, the Law Institute prepared the draft of an amendment to Article 929 of the Code of Practice, which was adopted at the last session of our legislature. This amendment made two significant changes in the code provisions regulating the place where the succession was to be opened. Firstly, it provided an order consisting of four, rather than three, determinative factors of jurisdiction: (1) parish of decedent's domicile; (2) if no domicile in this state, parish where decedent left immovable property; (3) if no domicile or immovable property, the parish where decedent left movable property; and (4) if no domicile or property in this state, parish where the decedent died. Secondly, under the former code provisions, the district court of only one parish could ever have jurisdiction to open the succession; under the amended provision, two or more courts now might have jurisdiction to open the succession, if a nonresdient defendant either leaves immovable property in two or more parishes or if he has no immovable property and leaves movable property in two or more parishes.

Under the recent amendment, solution of the problem of competing jurisdiction which will arise whenever different heirs initiate the opening of successions in different parishes is afforded only by the *probability* that the conventional rules of judicial comity will be applied, that the court first seized of jurisdiction will retain it, and that the second court will stay further proceedings when the matter is called to its attention. Surely, in our new procedural code there should be an express provision on this point to insure the *certainty* of this result, without the necessity of having the Supreme Court settle the matter.

A less likely problem, but nevertheless one which might present itself, rests upon the possibility that the succession of a nonresident leaving no immovable property in the state might be opened in one parish on the theory that decedent left movable property there, and it subsequently develops that this movable property was in another parish. The trend of modern procedure is to permit the transfer of the cause to the proper court, when the initial court had no jurisdiction, and such transfer was deemed in the interest of justice. In the draft of the new Code of Practice, the Law Institute is recommending that generally the trial judge should be given the discretion to order such a transfer. Should similar discretion be granted to the judge in proabte cases?

The provisions of Section 61 of the Model Probate Code afford admirable solutions of these and related problems, and are well worthy of consideration in the drafting of the title on Probate Procedure in the new Code of Practice.

2. *Notice of hearings; ex parte appointment of succession representatives.* Opportunities for improving and simplifying our succession procedure appear to present themselves with respect to the notices now required to be given heirs and creditors of the filing of applications for letters of administration, of the probate of wills, and of the filing of tableaus of distribution.

Under our present succession procedure, every application for letters of administration must be advertised for a period of ten days. The rationale of this requirement is that through such advertisement every person having a reason to oppose the application is thus notified of its filing, and allowed a period of ten days to file his opposition thereto. In the vast majority of these cases, the application for letters of administration is filed by

the surviving spouse, or some other responsible member of decedent's family, with the full knowledge, consent, and approval of all the legal heirs. The required publication in these instances serves no useful purpose whatever. It does, however, require the expenditure of unnecessary costs of publication, and what is much more important, it delays the appointment of the administrator for at least eleven days. While admittedly notice of the application for letters of administration serves a useful purpose in a few cases, why should the court not be given the discretion to make an immediate appointment of the administrator on ex parte application in the much larger number of cases where notice of the application would serve no useful purpose?

Further, considerable difference of opinion exists as to the efficacy today of notice through publication. Certainly, a special notice served through the mail or by the sheff is much more effective in affording interested parties an opportunity to oppose the application.

Another facet of much the same problem is presented with respect to the notice to be afforded the heirs at law of the probate of the will. Here, under present Louisiana law, notice by publication is not required, and the only heirs at law who are entitled to notice of the probate hearing are those who reside within the parish where the will is to be probated. This rule may have been the most workable one possible a hundred years ago, when our means of communication and transportation were so poor. It is not sufficient today. Would it not be advisable to permit any interested heir to file a request with the court prior to the opening of the succession, that the heir or his attorney be notified of the probate hearing? Are not heirs who are not residents of the parish or even of the state entitled to notice of the probate hearing when they specially and timely request it?

Presently, notice of the filing of the tableau of distribution by the administrator or the executor through publication is required, and interested heirs or creditors are allowed ten days to oppose the tableau. Cogent reasons suggest the continuance of notice by publication here. But should not this system of notice be supplemented by special notice mailed to the interested party or his attorney when a request therefor is submitted to the court in advance? Why should the only notice given these interested parties be through the medium of tiny print lost in a host of judicial advertisements on the back pages of the local newspaper?

One possible solution of these and related problems would be: (1) to permit interested parties to file timely with the court a request that they or their attorneys be given special notice of these hearings; and (2) grant the court discretion to probate wills and appoint executors and administrators upon ex parte application when no such requests for special notice have been filed, and the court is of the opinion that notice through publication would serve no useful purpose. In this connection, Sections 66-68 of the Model Probate Code appear to have much to offer to the Law Institute in the drafting of our new probate procedure.

3. *Persons entitled to letters testamentary or of administration; disqualification.* Areas of our succession procedure which have long been overdue for clarifying legislation are the subjects of priority of the claims of various applicants for letters of administration and for letters testamentary when no executor has been named or the one named is dead or will not accept the office and the judge has to make a dative appointment, and of the criteria to be applied by the judge in selecting one of the applicants from several enjoying the same priority of appointment. With respect to the priorities of applicants for letters of administration, two sets of code provisions afford rules on the subject. None of these articles is as clear or as precise as might be desired. Further difficulties are presented by doubts as to whether a particular article concerning a priority in appointment as curator of a vacant estate is equally applicable to a contest between applicants for letters of administration. While the majority of the questions connected therewith have been settled by prior jurisprudence, the complete rules on the subject can be obtained only after an extended research into the Louisiana jurisprudence interpreting and applying these articles. The selection of the person to be appointed dative testamentary executor, when no succession representative has been named in the will or the person named cannot or will not accept the appointment, presently is left entirely to the discretion of the judge. The criteria to be applied by the judge in the selection of one or two or more applicants for letters of administration having the same priority are to be found only in our jurisprudence.

Section 96 of the Model Probate Code, in the clearest and most precise of language, provides the order of persons entitled to domiciliary letters and the matters which disqualify a person

for such appointment. Probably the priorities provided by this section could not be accepted completely in Louisiana, but the arrangement of its provisions, and the clarity and precision of its language, appears to offer invaluable assistance to the Law Institute in the drafting of rules on the subjects embraced therein.

4. *Continuance of decedent's business.* One of the deficiencies of our present Louisiana probate procedure is the absence of express authority for the court to permit the administrator of a succession to continue the business of the decedent. There are two alternatives to an immediate liquidation and termination of such a business. The first is the immediate putting of the heirs into possession of decedent's estate, but this may prove impossible when some of the heirs are minors; and under certain circumstances might involve the risk of the heirs' accepting a succession which subsequently proves to be insolvent. Secondly, a friendly administrator keenly interested in the welfare of decedent's family might be willing to continue operation of the business at his own risk, but this alternative presents dangers too real to be ignored. While the administrator might protect himself to some extent by obtaining consent and authority therefrom from the major heirs, it is not possible to protect him against the subsequent claims of minor heirs for losses sustained during the administratino. Even in those instances where all of the heirs are majors and authorize the continuance of the business, the administrator would still be subject to liability to the creditors, in the event the succession was insolvent. Even the continuance of decedent's business by an executor under authority conferred in the will may impose very definite risks upon the executor, unless the will is sufficiently broad and explicit to authorize all acts of the executor during his operation of the business. No authority exists for the continuance of a business operated by a partnership of which the decedent is a member, except for the purposes of an orderly liquidation thereof.

These are very real deficiencies in our probate law. Corporate ownership of small businesses, which some years ago enabled a business man to protect himself against the enforced liquidation of his business upon his death, no longer offers a ready solution of the problem. With the sharp increase in income taxation during the last few years, small businesses increasingly are being forced into individual and partnership ownership and operation.

Section 131 of the Model Probate Code, which empowers the court to authorize the continuance of decedent's business, appears to have provided a workable solution of these problems. The provisions of this section would appear to offer invaluable assistance to the Law Institute in its task of drafting the articles of the new Code of Practice on the subject.

5. *Contracts to convey or lease lands.* When a person who has agreed to sell or lease land dies before the execution of the sale or lease, there are no provisions in our present succession procedure to empower the trial judge to authorize or direct the succession rerpesentative to execute the sale or lease. The other contracting party has remedies available, but these may be too cumbersome, expensive, or slow to protect his interests adequately; and when some of the heirs are minors, the problem is accentuated sharply and aggravated appreciably. These difficulties, furthermore, may be obviated readily. The creditors would not be prejudiced by the simpler and more direct approach of the execution of the sale or lease by the succession representative, as the consideration received therefrom would be made available for the payment of their claims. The heirs, whether major or minor, have only a residual interest in the estate. Further, we are speaking here of an agreement of sale or lease which was legally enforceable against the decedent had he lived, and hence legally enforceable against his heirs and creditors after his death.

Section 132 of the Model Probate Code has provisions which empower the court to authorize or direct the execution of the sale or lease by the succession representative with the same effect as if consummated by the decedent himself. They appear to offer a relatively simple and completely workable solution of the problem under consideration here, and hence to provide an effective guide towadrs the solution of the identical problem in Louisiana.

6. *Adjusted compromises.* The compromise of any controversy concerning the validity or effect of any will or provision thereof, or concerning the rights of any legatee, heir, or beneficiary of a testamentary trust, presents no problem in Louisiana when all of the interested parties are present and have capacity to contract. It is then simply a matter of agreement among the parties. A compromise of such a controversy becomes more of a problem, however, when one or more of the interested parties are minors or otherwise lack legal capacity. A tutor or curator

may have to be qualified, and in all cases the special procedures applicable for obtaining authority for the representative to execute such an agreement in behalf of the incapacitated person represented must be followed. In these cases, while authority to execute a compromise agreement can be obtained, the procedure therefor is slow, cumbersome, and circuitous. The problem becomes impossible of solution under present Louisiana law when one of the interested parties is a person whose existence or whereabouts are unknown, or is an unborn child.

Sections 93 through 95 of the Model Probate Code empower the court to authorize the execution of any compromise agreement which the court considers just and equitable. The execution of such an agreement, after judicial approval, concludes all of the parties to the same extent as would a judgment of the court rendered after a trial or hearing of the controversy. Ample provision is made for the representation and protection of the rights of all incapacitated and absent parties. Some adaptation of these provisions would have to be made, but this would consist primarily of the substitution of civilian for common law terminology, and providing for the appointment of an attorney at law in lieu of a guardian ad litem to represent absent or incapacitated parties not otherwise represented.

7. *Prescription of will contests, probate of wills.* Neither the order of court admitting a will to probate, nor the judgment sending the legatee into possession of his legacy, is conclusive of the validity of the will or the ownership of the legatee. They afford merely prima facie proof thereof. Until liberative prescription bars the right to annul the will, or until the legatee or his assigns acquire ownership of the property through acquisitive prescription, title to such property may always be defeated through a successful contest of the will. In a few cases, such a possibility extending over a considerable period of time might well make titles to immovables insecure and unmerchantable.

Under our present law, actions to annul or rescind wills are prescribed in five years. Considerable difficulty has been experienced in other jurisdictions, and probably in Louisiana as well, because of the length of time available to contest a will. Under our present law, the liberative prescription of five years commences to run against minor heirs only upon their attainment of majority. Further, the pertinent code provision has been construed by our Supreme Court as not being applicable to an action

to annul a will on the ground of forgery. In the latter case, the only prescription which affords protection to purchasers of immovables from the legatee is the longer acquisitive prescriptions of ten and thirty years.

A problem somewhat akin to that presented by the belated contest of the will is the belated probate of a will. This may be presented in two different ways. Firstly, a judgment sending heirs into possession, and based upon the assumption that the decedent died intestate, may be overturned years later by the tardy probate of a will, or an alleged will, of the decedent. Secondly, a will of the decedent may be probated, and the legatees sent into possession thereunder, only to have their titles defeated through the probate of a subsequent will, which revoked the first will. In both of these instances, purchasers of immovables from the heirs in the frist case, or from the legatees under the second case, are left without the protection of any prescription barring the tardy probate of the will. The only protection afforded them through prescription would be the acquisitive prescriptions of ten and thirty years.

Would it be desirable to require will contests to be made within a relatively short period, and bar the probate of a will after a period of say five years from the death of the testator? The question primarily is one of substantive law, and if any change of our law is to be made, it must be effected primarily through amendment of the pertinent articles of the Civil Code, or by special legislation. But such a change, if made, would require implementation through provisions of the new procedural code, hence the necessity for considering these problems in connection with the new Code of Practice. There is considerable merit in both the arguments supporting, and those opposing, any suggestion for changes of our law in these respects. The economic importance of protecting the title to immovable property, reflected in our public policy with respect to registry and recordation, appears to support strongly a demand for such changes. On the other hand, a recognition of the right of a testator to dispose of his property, protection of the interests of the legatees named in a will discovered belatedly, and our vivid memories of the Myra Clark Gaines litigation, all unite in resisting any demand for these changes. On these issues, the Reporters on the Code of Practice revision are not prepared at this time to make any recommendation either pro or con.

The Reporters do, however, pose the problems, and point to their solution under Sections 73 and 83 of the Model Probate Code. In any consideration of the issues, and in making any change of our present law in these respects, certainly these provisions of the Model Code, and the extensive study of the problems made prior to their drafting, should not be overlooked or ignored.

As has been pointed out before, limitations of time prevent discussion of the many procedural provisions of the Model Probate Code which may profitably be studied in connection with the revision of the probate law of Louisiana. The writer has discussed specifically only a few of the problems which must be solved in the revision of our probate law, so as to illustrate the valuable assistance which may be afforded us in this task by the Model Probate Code. The potentialities of the latter, however, are not to be considered as being limited to the few sections mentioned here solely for the purposes of illustration.

First Red Mass Celebrated in Louisiana

A Red Mass sponsored by members of the Louisiana Bench and Bar was celebrated Monday, October 5, 1953, at 4:30 P. M. in St. Louis Cathedral in New Orleans.

The Red Mass has been customarily celebrated annually at the beginning of the Judicial Year in many European countries since the thirteenth century.

This service is celebrated for the purpose of invoking Divine guidance and strength upon the administration of justice.

In the United States the Red Mass has been celebrated in Washington, Philadelphia, New York, Chicago, Boston and other large cities.

All members of the Bench and Bar of the State were invited to attend.

Celebrant of the Mass was The Most Reverend L. Abel Caillouet, Bishop. His Excellency, The Most Reverend Joseph Francis Rummel, Archbishop of New Orleans presided and delivered the sermon. Mr. Charles Rivet of New Orleans was in charge of protocol.

Memorial Exercises Before The Supreme Court of Louisiana

On Monday morning, October 5, 1953, at 11:00 A. M. the Supreme Court of Louisiana was duly convened, all of the Justices being present, Honorable John B. Fournet, Chief Justice, presiding.

Our President, Mr. Richard B. Montgomery, Jr., addressed the Court informing them that on the first day of this new term of the Supreme Court that the Bar was meeting to honor, eulogize and commemorate the members of the bench and bar who had died during the last year.

The invocation was by Reverend Carl J. Schutten, Pastor, St. James Major Catholic Church of New Orleans.

Eulogies on the Honorable Gaston Louis Porterie of Alexandria, late Judge of the United States District Court for the Western District of Louisiana, were given by H. Payne Breazeale of Baton Rouge and Camille F. Gravel, Jr., of Alexandria.

The late John Hugo Dore of Ville Platte, Judge of the First Court of Appeal of Louisiana, was eulogized by the Honorable J. Cleveland Fruge of Ville Platte, the Honorable Sam A. LeBlanc, Justice of Louisiana Supreme Court of Napoleonville, responded.

The announcement of those memorialized and presentation of individual memorials was made by Thomas W. Leigh of Monroe, Vice-President of the Louisiana State Bar Association.

The general eulogy was delivered by John L. Pitts of Alexandria, the Honorable John B. Fournet, Chief Justice, delivered the closing remarks.

The benediction was by Rabbi Emil W. Leipziger, Rabbi Emeritus Touro Synagogue, New Orleans.

Convention News

As previously advised the Convention of Louisiana State Bar Association will be held at the Buena Vista Hotel, Biloxi, Mississippi, May 2nd through May 5th, 1954.

Once again we urge all members who are planning to attend to write to the Secretary requesting accommodations which he wishes for the convention and forwarding therewith the deposit of $15.00 which has been requested. In the event the Secretray is notified ten days prior to May 2, 1954 of a cancellation the deposit will be refunded.

The rates at the Buena Vista Hotel, European plan, are as follows:

Single rooms from $4.00 to $7.50;
Double rooms from $7.50 to $12.50;
Suites from $17.00 to $22.50.

Arrangements have been made with the Buena Vista Hotel to also accommodate members in the Hotel Biloxi and the White House. Both of these hotels are on the beach and in close proximity to the headquarters hotel, the Buena Vista.

The tentative program for the convention will be as follows:

Sunday, May 2, 1954, 4:00 P. M., Registration; 6:00 P. M., Reception by the Board of Governors;

Monday, May 3, 1954, Joint Meeting of Louisiana State Bar Association and Louisiana State Law Institute;

Monday night, May 3, 1954, Banquet, Louisiana State Law Institute;

Tuesday, May 4, 1954, Section Meeting;

Tuesday night, May 4, 1954, Dance;

Wednesday, May 5, 1954, Meeting of Louisiana State Bar Association until noon;

Wednesday afternoon, May 5, 1954, Barbecue.

You will note from the above that one full day is being devoted to section meetings. This was done in an effort to permit more time for the holding of the meetings of the various sections and to permit more members to attend those particular sections in which they are interested and to avoid any conflict in meeting times.

All members are urged to plan now to attend the convention and to address their request for reservations to the Secretary.

RESOLUTION CONDEMNING ACTIVITIES WHICH TEND TO BRING LEGAL PROFESSION INTO DISREPUTE ADOPTED BY AMERICAN BAR ASSOCIATION

At the recent convention of the American Bar Association in Boston, Mass., the following resolution was presented by Cuthbert S. Baldwin of the New Orleans Bar:

"WHEREAS, it is the duty and obligation of all members of the Bar, whether employed in governmental service or engaged in the private practice of the law, to at all times uphold the honor and maintain the dignity of the profession and to so comport themselves that they will find their highest honors in a deserved reputation for fidelity to public duty and to private trust; and

"WHEREAS, there have appeared in the Press, from time to time and over a long period of time, charges of corruption and dishonesty, and of improper and unethical practices involving certain attorneys who have held high government office and certain attorneys engaged in private practice; and

"WHEREAS, such charges tend to bring the Bar of this Country into disrepute:

"NOW, THEREFORE, BE IT RESOLVED BY THE BAR ASSOCIATION

"That this Association condemns any activities on the part of attorneys, including those who have held or may now hold governmental office, or who are engaged in the private practice of law, which tend to bring the profession into disrepute; and recommends that any charges alleging such improper practices should be promptly investigated by the proper Committees of the American Bar Association and the various State and local Bar Associations or other agencies of the Courts or bodies having jurisdiction to the end that such persons, if found guilty be censured by our suspended or expelled from such Associations, if members, and officially censured or suspended or disbarred from the practice of law.

"BE IT FURTHER RESOLVED

"That this Resolution be referred to the Standing Committee on Professional Ethics and Grievances of this Association and that copies thereof be sent to the various State and local Bar Association."

Mr. Baldwin was joined in the presentation by George T. Madison of Bastrop and John C. Satterfield of Mississippi.

The resolution was adopted.

The Responsibility of the Bar

Address delivered before the Shreveport Bar Association October 27, 1953, by Walter P. Armstrong, Jr., Memphis, Tennessee, member of the Tennessee Bar.

Not long ago, while reading the recently published correspondence of James Boswell, I came across a passage from a letter which he wrote to the father of a young lady whom he had met on his travels in Holland and whom he thought at that time he was going to marry. Boswell was describing his qualifications to his prospective father-in-law, among them that he expected soon to be admitted to the Scotch Bar. Then he added these words:

> "I need not, I am sure, tell you that the profession of advocate in Scotland is in no sense degrading, as, by an absurd fashion, it has come to be looked upon in some other European countries."

Why, I wondered when I read this sentence, should James Boswell, writing on January 16, 1766, feel as, despite his protestations, he obviously did, that it was necessary to make this explanation? Why did he need to point out that the fashion of looking upon the law as a degrading profession was absurd? And how had that absurd fashion come into existence at all? For it has not entirely disappeared during the almost two centuries which have followed, and even today you can hear in many quarters the profession of the law referred to in a derogatory manner, not only by the uninformed, but by those whose opinions should be better founded and considered as well.

This attitude towards lawyers was not new even in Boswell's day, for it can be traced far back into antiquity. It was Saint Luke who said, "Woe, unto you, lawyers: for ye have taken away the key of knowledge; ye entered not in yourselves, and them that were entering in, ye hindered." Even earlier, Plato had excluded them from the perfect state which he describes in his "Republic," and later so did Sir Thomas More, saying of the citizens of his Utopia, "They have no lawyers among them, for they consider them as a sort of people whose profession is to disguise matters." It is this belief that lawyers

obscure that which would otherwise be clear which seems to be largely responsible for their reputation. A modern poet writes:

"In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howevers,
Too much hereinbefore provided whereas,
Too many doors to go in and out of.
When the lawyers are through,
What is there left, Bob?
Can a mouse nibble at it
And find enough to fasten a tooth in?
Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?"

Not a very flattering picture of our profession, and not, let us hope, a justified one. And yet, if it is possible for the moment to adopt the layman's point of view, it is easy to see how a prejudice against lawyers might arise. For the contact which the average layman has with the courts is usually in one of three capacities. Either it is as a party litigant, a witness, or a juror. And in each of these capacities the impression which he is likely to form of the judicial process will probably not be to its credit. The disappointed litigant is invariably convinced that the loss of his cause is due to a flaw in the law and not to any weakness in his case, while on the other hand the successful party is equally certain that he has received no more than justice, meanwhile having been subjected to what Shakespeare mildly calls "the law's delay." Thus every lawsuit tends to make no new friend but one new enemy for the profession.

The witness, on the contrary, is often turned against the law because he has no interest in the outcome of the trial in which he is forced to participate. Summoned from his home or his business under penalties implying that he would evade his contribution to the cause of justice if he could, he is forbidden even the privilege granted the general public of observing the progress of the case, but must wait in draughty halls alone or with others of his kind until his turn arrives to be injected without warning or preparation into a proceeding of the very nature of which he is often ignorant. Once translated from outcast to the cynosure of all eyes, he is then called upon to recollect in the minutest detail facts which when they occurred may have been of no significance whatever to him, much less

of any interest; and if he fails to do so, is treated by all alike as the very paragon of stupidity. After the attorney for the party upon whose behalf he appears has finished attempting, by all of the substle means permitted by the rules of procedure, to persuade him to testify not to what he remembers but to what counsel thinks he should remember, he is then subjected to a grueling ordeal known as cross-examination in which an adversary skilled in the rules of the game makes every effort to force him to transgress those rules, and once he has done so seizes upon any little inconsistency or human fallibility as a pretext for insidiously insinuating that he is a fool or a liar or both. Is it any wonder that, aside from a class known as experts who become hardened to this process, the average witness is reluctant.

Although I have never practiced in your state, I understand that with you the jury trial is a comparative rarity. There are those who would say that in this you are fortunate; there are others who swear by the twelve good men and true. But my concern at the moment is with those who compose this instrument of justice, for their plight is little better than that of the witness. Subjected to the same type of questioning (although to a lesser degree) before they are accepted for a service which they have not sought, once empanelled they are bored by testimony and berated by argument until the limits of human endurance are approached and even surpassed. They are herded about the corridors like sheep, bidden here and there at the whim of judge and counsel, forbidden to discuss among themselves or with others the one subject which is uppermost in their minds, excluded from the courtroom while the lawyers engage in mysterious activities which are never explained to them, and then, after hours of tireless devotion and just when it at last appears that they might serve some useful function, they are frequently informed that the case has been decided by some higher power in their absence and that their services are no longer required. If not, they are bombarded with a conglomerate mass of law which the lawyers themselves can often analyze only after hours of study based upon years of training but which they are expected to absorb and apply at a single hearing, and are then instructed to decide the case forthwith and without time for reflection or meditation. If they delay, they are sometimes compelled to pass a night under circumstances usually reserved for the meanest criminals; and if the verdict which they bring in is not in accordance with what the

Court thinks it should be, it is ruthlessly revised. These are the experiences which might well lead a countryman, after his first jury service, to express himself in the words of Will Carleton:

"My business on the jury's done—the quibblin' all is through—

I've watched the lawyers right and left, and give my verdict true;

I stuck so long unto my chair, I thought I would grow in;

And if I do not know myself, they'll get me there ag'n.

But now the courts adjourned for good, and I have got my pay,

I'm loose at last, and thank the Lord, I'm goin' home today."

If these strictures upon our profession appear rather stringent, remember that they are imagined from the layman's point of view. Nor are they the only ones with which we have to contend. There is one major criticism with which we have not yet dealt. Perhaps Charles Dickens put it in its most virulent form when he wrote in "Blear House":

"The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble."

Unfortunately the irony of this passage is sometimes lost; for there are those who at least appear to take this as their guiding principle. And while they are far from characteristic of the bar as a whole, it is they upon whom the public's impression of the bar as a whole is often formed. Just as the bank teller who embezzles gets more notoriety than his hundreds of associates who pass their lives in honest service, so the lawyer who perverts his practice to mercenary ends casts a reflection upon all of his higher minded brothers. Perhaps it behooves us to clean our house before we ask others to admire its spotlessness.

But I have dwelt long enough upon the gloomy aspects of the case; let us look for a moment at the brighter side. It is considered impolite to blow your own horn, but if no one else will blow it for you, it is either that or continue in unmitigated silence. Therefore perhaps I may be pardoned if I speak of some of the excellencies of the law and of lawyers. We are the inheritors of a tradition unequalled in any other profession. And while the law is, or should be, no more than the intelligent application of common sense, still it is common sense raised to the Nth degree. Too often the lawyer makes a mystery of his craft, and tries to impress his client by the glib use of Latin phrases, or casual references to legal principles which he silently implies are too subtle for the uninitiate to understand. Perhaps we would stand in better stead with the public if we admitted that we can do nothing that the ordinary intelligent man could not do for himself; but that we have been trained in methods and means of doing these things, derived as a result of the experiences of countless generations of lawyers and judges who have preceded us, which expedite accomplishment and minimize the risk of error. Perhaps then it would be more apparent that the function of the lawyer is to forestall and prevent, not to create or encourage, litigation, and that the greatest service which he can perform is to keep his client out of court.

These principles are universal; but I like to think that there is a special affinity between the law and the democratic process. The mere presence of lawyers presupposes that litigants will submit their causes to a properly constituted tribunal and will abide by its decision, just as the mere existence of a democracy assumes that the voters will delegate the selection of their governors to the will of the majority. So thought one of our earliest and friendliest critics, Alexis de Tocqueville, when he said:

> "The profession of law is the only aristocratic element which can be amalgamated without violence with the natural elements of democracy, and which can be advantageously and permanently combined with them."

His judgment, it seems has been justified by the fact that the majority of the signers of our two basic political documents, the Declaration of Independence and the Constitution, were lawyers, as have been twenty-two of our thirty-three presidents.

But the contribution of the lawyers to our way of life is not always so direct. In his community, as in his profession, he represents a way of life dedicated to reason and the public good. There are few civic projects in which the bar is not represented, still fewer to which its contribution is not positive, constructive and well considered. There is no group of men which gives more of its time unselfishly to public service. The prevalence of Legal Aid Offices, Lawyers' Reference Bureaus, and like organizations are substantial evidence that the interest of the bar is in seeing that rights are protected regardless of financial ability, while the number of lawyers serving in legislative positions is testimony to their interest in the improvement of our laws.

There is one more quality of our profession that I must note, for to me it is one of the most valuable that we possess. That is the spirit of conviviality and solidarity which binds the lawyers together. Perhaps it is because of the unique fact that it takes two lawyers to make a lawsuit, and therefore that the prosperity of each is based upon the presence of others; but in any event it is a fact that professional jealousy is almost unknown among us. I am happy to say that many of the closest friends which I have today are attorneys whose acquaintance I first made because they were opposing counsel in a lawsuit in which I participated. Truly, as Shakespeare said, we "do as adversaries do in law, strive mightily, but eat and drink as friends."

It is my conviction that the finest expression of this spirit is found in the organized bar. Whether it be local, state or is found in the organized bar. Whether it be local, state or national, the combined force which lawyers exert through their bar associations is one of the most potent weapons available today against the forces which would destroy us all. There is an axiom of Euclid that the whole is equal to the sum of its parts. This may be true mathematically, but it is false in every other sense. The whole is far greater than the sum of its parts, a fact for which anyone who has compared an army on the march with a disorganized mob can vouch. For when energies are being dissipated aimlessly, they tend to cancel each other out; but when they are all directed toward a common goal, then they supplement each other so that the total force exerted far exceeds the sum of the individual components. And when that force is on the side of right, then right must be triumphant.

Unfortunately a false modesty has too long prevented the accomplishments of the organized bar from being known as fully and as widely as they deserve. The strict ethical standards which forbid the individual lawyer to advertise do not apply to the bar as a whole, where the benefit is conferred not upon one but upon all alike. Until the lawyers take steps to inform the public of what they and their organizations have done, they will have no one but themselves to blame if their position is misunderstood.

Other professions, with equally high ethical standards, have found it consistent with them to advise the public of their collective virtues. Not too long ago the terms "sawbones" and "pillroller" were rather freely applied, and it was not uncommon to hear the phrase, "a doctor buries his mistakes." Now the accepted picture of a physician is the kindly country doctor, hurrying on his mission of mercy through rain and darkness, guided by his unswerving devotion to the alleviation of human suffering. How has this come about? It is not the medical profession which has changed; its standards have been high since the days of Hypocrates. But it is only recently that the public has come to be fully aware of this. And this knowledge has not sprung spontaneously into its mind. It has been carefully nurtured there. Of the process I know little, and therefore will not speak; but the end result leaves me awed with admiration.

Let us examine, on the other hand, the commonly accepted picture of the lawyer. It is derived from radio, television and the movies, from the comic strip and the detective novel. He is a little ratlike individual with shifty eyes whose principal activity is to assist criminals in escaping well deserved punishment. To do this he will stop at nothing, including the manufacturing of evidence, subornation of perjury, and the corruption of judges and juries. He is a parasite upon the underworld, the "mouthpiece," the "shyster"; clever but not intelligent, successful but not quite honest.

There are, of course, exceptions to this portrayal. One which comes to mind is the motion picture, "The Magnificent Yankee," which did much to reinstate the bar in the public mind. But for one of these, there are a dozen gangster films in which the description given above is by no means exaggerated. And the idea has become so ingrained that it is difficult to eradicate. Let us hope that something can be done to counteract it before it is too late.

Fortunately something is being done. Bar associations all over the country are waking up to the fact that it is part of their function to combat this antipathy. There is no reason why the family counsellor should not be as venerated a figure as the family physician. Unfortunately in the past the usual idea for a public relations program for the bar has been the sponsoring of a series of panel discussions on "Recent Applications of the Rule in Shelley's Case" or some equally abstruse subject. But all of that is changing. The lawyers are coming to realize what shrewd advertisers have known from the beginning; that when you want to put a product over, you must present it in a form attractive to the consumer. I command to your attention a volume recently published by the American Bar Association entitled "Public Relations for Bar Associations," which contains numerous examples of this technique. To lawyers, familiar already with the truism that the same facts can have a totally different effect depending upon the manner in which they are described, surely a word to the wise will prove sufficient.

Yet there are limits which cannot be transgressed with propriety. The primary purpose of the bar must ever remain the perpetuation of the principles of justice, and all else must take a secondary place. It is fitting that we should approach the task which has been entrusted to us with confidence, but with confidence mingled with humility. Nowhere have I heard this better expressed than by the Reverend Hanford L. King, Jr., in the invocation with which he opened the regional meeting of the American Bar Association at Yellowstone Park last year, and perhaps it is fitting that I should close with his words:

> "From futile and artful controversies, from the commercial estimate of distinction and success, and from the degradation of a profession into a trade or a game, good Lord, deliver all judges, advocates and counsellors; that they may deserve the leadership which is put into their hands and fulfill thy holy purpose to judge the world with righteousness and the peoples with equity."

The Louisiana Purchase— A Constitutional Re-Appraisal

An address delivered by Rudolph J. Weinmann of New Orleans before The Round Table Club October 15, 1953.

The Louisiana Purchase one hundred and fifty years ago marked two firsts: (1) it was the biggest and the most profitable real estate transaction in all history—the earliest and largest installment purchase with no down payment; and (2) it posed for the first time sweeping questions respecting the extent and the effect of the treaty-making power under the Federal Constitution. It is with the latter phase—currently again the subject of constitutional law inquiry and litigation—that this article is concerned.

The background, historical and political, the state of public opinion, and the impelling motives prevailing at that time, must be set forth briefly if we are to evaluate properly the constitutional problems raised by the Purchase, the solution of which greatly influenced the subsequent development of the Republic.

WESTERN EXPANSION

With the close of the Revolution there was an acceleration of the trek of the pioneers across the mountains to the fertile plains of the Middle West. As the population there grew, so did commerce, and the need of that outlet to the sea, the Mississippi, became constantly greater. But at its mouth, at New Orleans, stood Spain, controlling navigation on the great river. Originally French through the discovery of LaSalle in 1682, this vast area had been ceded to the Spanish Crown in 1763.

As early as 1785 Ambassador Jay had tried to get from Spain concessions for the free passage of goods and ships down through the Mississippi to the Gulf, but without success. The Spanish imposed heavy duties upon American commerce, and in many ways made the passage of American ships tedious and expensive.

Within the term of a few years the tension grew and it became evident that more reasonable restrictions would have to be obtained, or a resort to force might be the only alternative. France had executed a treaty with England for free use of the port of New Orleans in 1763, prior to its cession to Spain, and

the American traders claimed they should be entitled to the benefits of this agreement; but this contention was rejected by the Spaniards.

In 1795 the Spanish Minister of State was Don Manuel Godoy, called the "Prince of Peace," whose attitude was known to be favorable. He was persuaded to grant by treaty action the right of deposit at New Orleans for a period of three years. In fact, the outlet thus obtained, though restricted in character, was kept open until 1802, thus quieting greater demands by Westerners.

When, in the year 1802, the Spaniards withdrew the right of deposit there was a great outcry in the West against this strangling of commerce; and immediately there was established sound reason for the acquisition of an open seaport. The American settlers did not indeed demand the entire area, but possession of the mouth of the Mississippi only. For controlling New Orleans, Spain like a giant hand throttled the expansion of the West.

Aggravating the situation and causing even greater alarm was the rumor that there had been, about 1800, a retrocession of Louisiana Territory to France by Spain. Jefferson realized that if indeed control of the Mississippi by Spain was bad, French possession under the redoubtable Napoleon, which appeared to be a possibility, was even worse. Too, on the resumption of the hostilities between France and England, the latter might well send a fleet to seize New Orleans.

Jefferson saw the danger immediately of the discontent and possible revolution in the West and its withdrawal from the Union if its trade to the sea were thus cut off because of Federal indifference. The consequent menace to American political and commercial independence would be grave.

The President wrote at that time:

> "There is on the globe one single spot the possessor of which is our natural and habitual enemy. It is New Orleans through which the produce of three-eights of our territory must pass to market and from its fertility it will ere long yield more than half of our whole produce. France placing herself in that door assumes to us the attitude of defiance. Spain might have retained it quietly for years . . . "

The explosive character of the situation was noted by all observers. While the people along the eastern seaboard had been slow to recognize the seriousness of this obstacle to national growth, it was nevertheless gradually the subject of considerable anxiety and debate, with a dawning realization of the neces-

sity for resolute measures. On January 7, 1803, the House of Representatives adopted a resolution on the subject of navigation at New Orleans, declaring their:

> " . . . Unalterable determination to maintain the boundaries and rights of navigation and commerce through the river Mississippi as established by existing treaties."

Benjamin Franklin early appreciated the value of the port, for in 1794 he wrote to Jay in answer to a suggestion that we should concede the Spanish claims:

> "I would rather with the Spaniards to buy at a great price the whole of their right on the Mississippi than sell a drop of its water. A neighbor might as well ask me to sell my street door."

The English naturally were watching developments very closely and Thornton, the English Ambassador to the United States, reported to Lord Hawkesbury in January, 1803:

> "The general sentiment upon the affair and upon the navigation of the Mississippi which is justly regarded as the basis of the prosperity of the western states, is such to convince a very superficial observer that an act of the greatest vigor, such as for instance taking possession of the island of New Orleans would be the most popular step the president could take . . . the greatest danger he has to apprehend will be from the inhabitants of the western states, who if the negotiations should go into great lengths and the right of deposit be interdicted, will most probably take upon themselves to vindicate their claims by some act of violence . . . "

Even in New Orleans the inhabitants were well aware of the unrest and of the threat of war. The French representative, Laussat, had arrived there, and in a letter to Decres, French Minister, commenting on the suspension of the right of deposit at New Orleans by the Spanish Intendant, Morales, and the American reaction thereto, wrote:

> "Already to believe those rumors of it, levies of men are being made, supplies are being prepared and an army of 80,000 men is about to descend upon us from the shores of the Ohio."

And one Paul Alliot, an Orleanian whose Journal of the Years 1803-04 is to be found in the Library of Congress, confirmed the danger of armed conflict, writing:

> "Les capitaines des navires que les Americains envoyent au Natchee, province du continent de l'amerique a cent lieues plus loin que la nouvelle orleans, en remontant le fleuve, sont egalement oblige'd'arreter devant le

> fort plaquemine, et d'observer les memes formalites que les capitaines des autre nations . . . Cette conduite affreuse et vexatoire a tellement indisposee le gouvernement americain, que, si la Louysiane etait restee aux espagnols, la guerre etait decidee entre les deux nations."

President Jefferson had indeed in 1802, through Ambassador Pinckney, attempted in vain to buy all or a portion of the mouth of the Mississippi from Spain, not knowing that the latter had secretly in 1800 by the Treaty of San Ildefonso, retroceded Louisiana to France. This failing, and confronted with the situation as we have outlined it above, Jefferson knew that a solution must at once be found peacefully or otherwise if internal conflict in the Republic were to be avoided.

He well expressed the need for prompt action when writing to Monroe on the latter's appointment as special envoy to France:

> "The agitation of the public mind on the occasion of the late suspension of the right of deposit at New Orleans is extreme—the measures which we have been pursuing, being invisible, do not satisfy their minds; something sensible therefore has become necessary and indeed our object of purchasing New Orleans and the Floridas is a measure likely to assume so many shapes that no instructions could be squared to fit them."

By "sensible" he meant, of course, a fixed, definite and permanent freedom of navigation of the Mississippi River by American vessels.

THE PURCHASE

The negotiations by Monroe and Livingston in 1803 with Barbe Marbois, Minister of Finance, Talleyrand, Foreign Minister, and Napoleon, First Consul, are well known and need only cursory review here. It is evident Napoleon made up his mind suddenly in April that he would sell to the United States not merely a portion of the Louisiana Territory around New Orleans, and West Florida, which the Americans were empowered to purchase for two million dollars, but the entire extensive area just re-acquired from Spain.

Historians do not agree entirely upon Bonaparte's motives, but quite certainly he must have recalled that the prior possession of the Territory by France had been unsatisfactory and expensive, the schemes of John Law alone for the settlement of Louisiana costing Frenchmen millions of livres; being on the brink of war with England he knew that France could not prevent the seizure of New Orleans by the British fleet; and finally, Napoleon needed money to prosecute the impending conflict and

the sale of Louisiana would to some extent supply this.

That he had well calculated all the factors involved in revealed by this observation to his ministers:

> "To emancipate nations from the commercial tyranny of England it is necessary to balance her influence by a maritime power that may one day become her rival; that power is the United States . . . Irresolution and deliberation are no longer in season. I renounce Louisiana. It is not only New Orleans that I will cede, it is the whole colony without any reservation."

Surprised though they were at the offer of the vast expanse of all Louisiana, and without authority from Jefferson to commit the United States to so expensive an enterprise, Livingston and Monroe accepted the offer, acting with courage and vision, expecting to be vindicated by the verdict of history, as indeed they have been.

Accordingly, on April 30, 1803 (the tenth day of Floreal in the eleventh year of the French Republic), the Treaty of Cession of Louisiana Territory was signed in English and in French versions by Barbe Marbois, Monroe and Livingston. In the treaty itself no mention is made of price, but it was understood that this would be eighty million francs, (fifteen million dollars) to be implemented by two convenants simultaneously signed.

The treaty document contained ten articles, and noteworthy for the purposes of this article are the following provisions: That the boundaries of Louisiana being uncertain, France was ceding the same territory re-acquired by her from Spain; that the United States would observe the Spanish Treaties with the Indians; that Spain and France were to have the same shipping privileges as United States vessels in the Louisiana ports for a period of twelve years; and most important of all being Article III with respect to the inhabitants of the Territory, and which was one of the main points of attack in subsequent debates in the United States Congress, reading in full as follows:

Article III.

> "The inhabitants of the said territory shall be incorporated in the union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

The first covenant stipulated sixty million francs represented by certificates of stock on which no principal payment was

to be made by the United States for fifteen years. Thus there was no down payment and the first installment was considerably deferred.

By the terms of the second covenant the remaining twenty million francs represented an estimation of the amounts due by France to United States citizens for supplies, embargoes and prizes made at sea prior to September 30, 1800 (18th Vendemiaire, 9th year of the French Republic) and which the United States assumed to pay as part of the price.

The envoys transmitted the signed copies of the Treaty and of the Covenants to the American Government and the debate before ratification began.

It was not until December 20, 1803, that Laussat, Representative of the French Government, made formal delivery of the Territory in a ceremony in the Cabildo at New Orleans, the United States being represented by Governor Claiborne and General Wilkinson.

CONSTITUTIONAL ASPECTS

a. Debates

Did the United States Constitution sanction the acquisition of foreign territory by a treaty containing specific conditions which upon ratification of the treaty would have the force of law superior to all other constitutional provisions and all legislative enactments? Such was the issue before the country in 1803 and such it is in varying aspects even now.

Only the over-whelming weight of public opinion tipped the scales for the Treaty of Cession one hundred fifty years ago; and popular feeling is indeed still today a decisive factor in the determination of constitutional questions. Consequently, we find an interesting parallel between the debates and discussions, then, and now. Louisiana Purchase Treaty, United Nations Charter, Statehood for Hawaii,—the arguments, pro and con, all have a familiar ring.

The moving spirit in the acquisition of the territory was, of course, Thomas Jefferson, but even he, while determined to complete the transaction, had considerable misgivings concerning the constitutional authorization. In fact to use his own words:

> "The constitution has made no provision for our holding foreign territory; still less for incorporating foreign nations into our union."

As a member of the majority political party advocating strict construction of the Constitution and opposed to the liberal views of the Federalists, he was bound to hold the opinion that

the Purchase could not be effected without at least an amendment to the Constitution. He went so far in fact as to prepare such a proposed amendment for ratification. But that he was determined to conclude the matter in any case was evident from his statement that he would first act "then appeal to the nation for an additional article in the Constitution approving and confirming an act which the nation had not previously authorized."

In the meantime, as he declared, "The less that is said about any constitutional difficulty the better, Congress should do what is necessary in silence. I find but one opinion as to the necessity of shutting up the constitution for some time."

It was, of course, rather generally held that the drafters of the Constitution had not contemplated the enlargement of the country implicit in the acquisition of the Louisiana Territory, and in fact the treaty-making power granted had in itself been the subject of objection in the debates in the Constitutional Convention.

While Jefferson was not a member of that Convention, he did later comment on the power to make treaties in his Manual of Parliamentary Procedure, concluding that the power was intended to be strictly limited.

Jefferson repeated his assertion of the need for a constitutional amendment in letters July 17, 1803 to William Dunbar, August 9, 1803 to John Dickinson, and on September 7, 1803 he wrote to Senator Nicholson:

> "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of treaty-making power as groundless."

Strangely enough, many of the members of the President's own party were in this instance for a liberal construction of the Constitution and finally persuaded Jefferson that constitutional authority was present. Accordingly, he gradually yielded personal opinion to expediency and what he considered to be the public interest and the common good, for he finally wrote:

> "If, however, our friends shall think differently certainly I acquiesce with satisfaction; confident that the good sense of our country will correct the evil of a construction when it shall produce ill effects."

But while Thomas Jefferson was supported by the overwhelming force of public opinion, and a liberal construction was much in accord with the general views of the Federalists on constitutional matters, many of the latter in the Congress never-

theless bitterly opposed the Treaty of Purchase of Louisiana, being actuated perhaps rather by political bias than patriotic motive; although it cannot be denied that many of their arguments were cogent and sound in a strict interpretation of the Constitution. While logically unanswerable, they were to the public mind without merit.

Principal objections to the ratification of the Treaty are summarized by Hart:

> "To sum up the objections to the Treaty: France had no right to cede it; the United States had no right to receive it under the conditions of the Treaty; it was not worth having on any terms; it was vast; it would disturb the balance of the Union; it would draw valued inhabitants from other parts of the United States; it would poison the settlors; the treaty was an extra-constitutional proceeding; the president and Senate did not represent the opinion of the country; and patriotic men ought to oppose 'such a pernicious measure as the admission of Louisiana, or a world, and such a world, into our union.' "

The reader can well grasp the attitude of the Federalists in opposition in the Congress from some of the statements made by them in debate.

Much of the opposition came from New England and Senator Timothy Pickering of Massachusetts expressed it best in his classic exposition of the state-compact theory. He said:

> "The Constitution and the laws of the United States made in pursuance thereof and all treaties made, or which shall be made, shall be the supreme law of the land, but a treaty to be obligatory must not contravene the Constitution nor contain stipulations which transcend the powers therein given to the President and Senate . . . It is declared in the third article that the inhabitants of the said territory shall be incorporated in the union of the United States. But neither the President and Senate, nor the President and Congress are competent to such an act of incorporation . . . (which) could not be effected without an amendmend to the Constitution . . . the assent of each individual state to be necessary for the admission of a foreign country to an association in the union . . . "

Similar objections were voiced by Tracy and Griswold of Connecticut. Senator Plumer of New Hampshire feared destruction of the importance of the New England states, and Griffin of Virginia predicted that "this Eden of the New World would prove a cemetery." Senator White of Delaware viewed the project

as a curse, even if authorized by an amendment to the Constitution.

While he was from Massachusetts, John Quincy Adams, Senator from that state, recognized the temper of the country and conceded that the step should be taken, but only if there were an amendment. Said he:

> "Allowing even that this is a case for which the Constitution has not provided, it does not in my mind follow that the treaty is a nullity or that its obligations either on us or on France must necessarily be cancelled . . . Such is the public favor attending the transaction which commenced by the negotiation of this treaty and which I hope will terminate in our full undisturbed and undisputed possession of the said territory, that I firmly believe that if an amendment to the Constitution amply sufficient for the accomplishment of all for which we have contracted shall be proposed, as I think it ought, it will be adopted by the legislature of every state in the union . . . "

One strong Federalist, John Adams, was however a defender on Constitutional grounds and in retrospect on February 9, 1811 declared that he was pleased with the Purchase and defended it not only as a necessity, but as supported by plausible argument in the Congress at the time of its consideration.

Nicholson defended the absolute right of the United States to increase its territory saying:

> "Had I been asked anywhere but in this house whether a sovereign nation had the right to acquire new territory I should have thought the question an absurd one. It appears to me to be too plain and unanswerable to admit of demonstration.

Two other Federalists, Governeur Morris and Alexander Hamilton, did not doubt the right of the Republic to acquire territory. Lafayette termed it "a blessed arrangement for Louisiana," and in writing Edward Livingston, the brother of the envoy: "With all my heart I rejoice on this great negotiation."

Though the Senate ratified the Treaty 24 to 7, we may conconclude that it was not so much argument as the compelling tide of events that determined the issue. As Thayer expressed it in his address before the American Bar Association on the occasion of the Centennial of the Purchase of Louisiana,

> "Moreover nations like individuals are sometimes compelled under the stress of circumstances to act promptly and decide questions solely on the consideration of self-interest."

And he concludes further:

> "I do not imagine, however, that any construction which might have been placed upon the federal compact at that early day would have prevented the American people from taking possession eventually of that great region west of the Mississippi River or from forcing a passageway to the Gulf. Written constitutions may hinder but they cannot prevent the growth of a nation nor suppress the natural propensities of a free, intelligent and enterprising race . . ."

A similar conclusion was drawn by Judge Cooley in his review of the Purchase before the Indiana Historical Society:

> "When the purchase was accomplished the parties concerned in it troubled themselves no more with scruples respecting the want of constitutional power . . . It established a precedent which was certain to be followed whenever occasion would invite it and it would be vain to contend that the constitution did not sanction what had thus with public approval been so successfully accomplished."

The conviction is therefore forced upon the present-day observer that it was public sentiment that validated the Purchase Treaty; and that had there been any large body of public opinion opposed at that time there would have been a controversy and an uproar which would either have defeated the project or failing that, have resulted in a secession of states—or a possible dissolution of the Union.

b. Re-Appraisal

Essentially the issues confronting the country today respecting dangers in the treaty-making power are no different from those posed in Jefferson's time; for whereas then it was the right to acquire foreign territory by treaty, and the effect of the terms of the treaty upon the fundamental law, now it is the impact of the treaty-making power to affect, limit and diminish the rights, immunities and privileges of the American citizen presently guaranteed by well defined provisions of the Constitution and implemented by many national and state statutes.

However, a noticeable difference is that no appeal to the courts accompanied or followed the Treaty of Purchase of Louisiana. In fact, the right of the Federal Government through treaty to acquire territory has never been seriously questioned in the counrts, and it is only the results flowing from the terms of such treaties that have had the attention of the judicial branch of the government.

It was not until 1828 that judicial cognizance was taken of

the acquisition of foreign territory by treaty, when Chief Justice Marshall in the *Canter* case declared:

> "The constitution confers absolutely on the government of the Union the power of making wars and of making treaties; consequently, that government possesses the right of acquiring territory either by conquest or by treaty."

Actually this language was dictum, because neither litigant made an issue of the right to acquire territory by treaty, the case really turning on the determination of the extent to which the Congress could confer jurisdiction upon a Florida territorial court.

Some fifty years later Chief Justice Taney in his opinion in the *Dred Scott* case went into this constitutional question also. Missouri, in which the litigation originated, was of course a part of the original Louisiana Territory. That decision is generally regarded now to have been entirely a political one, requiring no ruling except with respect to citizenship of a slave, so that its pronouncements on treaty powers are surplusage.

As to the consequences of territorial acquisition, it is well settled also that such action has no effect or influence upon private property rights. Similarly, no matter how the territory has been brought under federal jurisdiction, the authority of the Congress over it would seem to be unlimited.

Interestingly enough Article III of the Louisiana Treaty blanketing large numbers of inhabitants as citizens of the United States, which aroused such opposition, formed the subject of dispute in the courts in Louisiana, and was held not to contravene the Federal Constitution. In the *Desbois case* in 1812 the Superior Court of the Territory of Orleans, after reviewing the facility of naturalization in America, said:

> "It is therefore correct to conclude that foreigners who migrated into the Territory of Orleans after the cession acquired by the very act of migration an inchoate right of naturalization or territorial citizenship under the particular laws of the land (we mean those by which the country had been regulated under the Dominion of Spain, and which had been unrepealed) and the general principles of the American Government . . ."

Similarly, in 1813, the Federal District Court, sitting in New Orleans, passed on the question during the war with England as to whether or not persons born in the Kingdom of Great Britain, residing in Louisiana under the Territorial Government, should be considered as alien enemies. It was held that they were citizens of the State of Louisiana. Said the court:

> "The government has a right by treaty or by the admission of a new state to naturalize and such naturalization is equal to the other . . . An inhabitant is one whose domicile is here and settled here with an intention to become a citizen of the country. I conclude in agreeing with the judges of the late superior courts that by the several acts of Congress and by the admission of the state into the Union all the bona fide inhabitants became citizens of this state."

In at least one other case the Superior Court of the Territory of Orleans in 1811 declared emphatically that the question of the extent of the area purchased was a political one, and Congress and the President interpreting the Treaty, having declared that West Florida was included, the Court would follow this interpretation, saying:

> "Congress are the legitimate interpreters of treaties. To their interpretation every citizen is obliged to submit, they have the power to repeal them and the declaration of war is the repeal of the treaty of peace . . . They may declare a treaty no longer obligatory, as in the case of the Treaties with France in 1798, 4 Laws U. S. 162 chap. 84. The power of repealing must include that of interpreting. Omne majus includit in se minus."

Within the scope of this article we cannot from 1803 to today trace the vicissitudes of treaty action and treaty interpretation, but we can note that just as then there was outcry and demand for amendment of the Constitution, so now has the Pandora's box of United Nations' proposals brought fresh cries for amendment and for public awareness of the attack upon fundamental American heritages through the medium of the treaty-making powers. Is the trend to "treaty-law" such that there is cause for alarm, and nede for arousing public sentiment lest our privileges be lost by default?

Chief Justice Hughes stated (*Santovincenzo vs. Egan,* 284 U. S. 30 1931):

> "The treaty-making power is broad enough to include all subjects properly pertaining to foreign relations."

Furthermore, said Hughes, in *Burnett vs. Brooks,* 288 U. S. 378 (1933:

> "As a nation with all the attributes of sovereignty, the United States is vested with all powers of government necessary to maintain an effective control of international relations."

Willoughby has declared that the Supreme Court would

sooner or later repudiate the doctrine of reserved powers to the states when interpreting treaties.

The Supreme Court has already gone so far as to hold in *Missouri vs. Holland,* and even in earlier cases, that treaty provisions will over-ride state statutes.

This ever-increasing possibility of local government by treaty is receiving the attention of many thoughtful writers who are properly trying to arouse and influence public opinion in this country.

Graske has pointed out that the Supreme Court has never held any treaty to be unconstitutional. This observation has been made also by Holman, and his alarm at the present tendency of absolute interpretation of treaties was well expressed in 1950 when it became evident that a whole series of treaties would be proposed by the United Nations for ratification by the United States Senate. He said:

> "Certainly until recently to the average lawyer it would have seemed unthinkable that the treaty-making power of the Federal Government could to any extent be used to make domestic or local law for the people of he various states, and fantastic that through the treaty-making power state and federal legislative processes and judicial processes could be by-passed . . .

Only in recent months Deutsch in a well-reasoned article in the Journal, citing the need for constitutional amendment limiting the treaty-making powers, observed:

> "In any event since the last dozen years have seen hundreds of earlier decisions overruled and disregarded, it seems appropriate not to rest content on the dicta of earlier cases, but to settle by unequivocal language for all time that treaty-making powers cannot be used for purposes in conflict with the Constitution."

Likewise, Ober (who presents a draft of such proposed amendment) recognizes the power of the popular will in connection with the present fears, pointing out:

> "But a major objective of our constitutional form of government which imposes retraints intended to protect us from our own representatives and the tyranny of temporary majorities must be to see that basic changes are only made by the deliberate decisions of the people themselves. Therefore, it is submitted the the time to close by appropriate limitations the dangerous gaps in the treaty-making and amending powers is before and not after it is too late."

There is, of course, no unanimity of opinion that danger lurks today in the treaty-making power, which only an amend-

ment to the Constitution can avert. Professor Chafee in particular denies it emphatically. Moskowitz defends as vigorously the Covenant of Human Rights, a United Nations treaty project now to the fore. Obviously the judicial branch does not share these misgivings either, or the decisions would not be giving continuously more emphasis and validity to treaty-law.

An amendment may or may not be the solution. Aroused public opinion will determine the issue in every case, as it did in 1803. If the adoption of many of these proposals in treaty form threatening our framework of government appears probable, it is because their terms are visionary, complicated and little known to the average citizen. The American lawyer does well to expose and explain them, that public opinion may be formed to modify their effect by constitutional amendment, or to influence their defeat. A universal conviction to resist constitutional attrition by treaty action must be firmly established and firmly held.

(*Note:* Citations and References have been omitted, but will be supplied by the author on request.)

BOOK REVIEWS

The Tidelands Oil Controversy

By Ernest R. Bartley

Austin, 1953: University of Texas Press. Pp. x, 312. $5.00.

Subtitled "A Legal And Historical Analysis," this timely work presents also a multilateral exposition of the controversial political issues that finally exploded in the submerged lands debates of the 1952 Presidential campaign and the 83rd Congress. It is not, therefore, to be viewed in the narrow concept of a juridical treatise upon a great constitutional issue. Constitutional disputations cannot be and never have been segregated from the sweep of history and the political arena of the times in which they reach their resolution. In this concept the book valuably focuses into the composition of its picture most of the major facets of the controversy apparent up to the time of publication.

It is unfortunate, however, that the author completed his labors before those of the first session of the 83rd Congress were concluded. True, the patterns of political pressure and determination were readily apparent by publication date, so that the reasonably accurate predictions of the concluding chapter of the probable nature of Congressional quit-claim to the

seaboard states were justified. They were soon rendered innocuous, however, by enactment of the Submerged Lands Act (83rd Congress, Chapter 65—Public Law 31, approved May 22, 1953) and the Outer Continental Shelf Lands Act (83rd Congress, Chapter 345—Public Law 212, approved August 7, 1953).

The first of these statutes is the famous quit-claim to the littoral states. The second of them attempts, *inter alia*, but in questionable manner, to fill the legal vacuum inherent in the assertion of title in the Federal government to the submerged lands of the continental shelf by the Submerged Lands Act. The Outer Continental Shelf Lands Act, *supra*, in essence reserves the applicability of Federal law to the subsoil and seabed of and artificial structures on the outer shelf and reserves the character of the outer waters as high seas. So far as they may be applicable and not inconsistent with Federal law, however, the statute extends the civil and criminal law of the adjacent state (excluding tax laws) to the subsoil, seabed and structures abovementioned the same as if the boundaries of the state were extended seaward to the outer limit of the shelf, but vests jurisdiction for administration and enforcement in appropriate Federal officers and courts. Jurisdictional and procedural concepts and requirements long prevailing as to admiralty and civil litigation in the Federal courts are thus obviously open to new challenges and developments in litigation arising from this enactment. Disappointing to the business community and the segment of the bar interested in these fields was the failure of Congress, despite the pressing needs of those expending vast sums in the development of the rich resources of the outer shelf, to spell out with more certainty the specific laws already persisting which would have application in the pertinent fields of the law controlling business activities between private parties. Thus, except as below noted, in respect of many types of problems that have already arisen from such private ventures as the construction, installation, encumberancing, financing, and, to an extent, the operation of structures, and involving items of property construable as vessels but of changeable character (such as submersible drilling barges), the precise laws applicable thereto will have to be determined mainly by inference and judicial construction. A study of the legislative history of the act conclusively demonstrates that the needs of the business community in these respects were never adequately presented to the Congress.

The Outer Continental Shelf Lands Act, *supra*, also ex-

tends The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. §§ 901-950) to cover disability or death of employees in oil exploration operations. Excluded from "employee" are the master and member of a crew of any vessel and public employees. But beyond the territorial jurisdiction of the states, claims of such nature are not dependent upon jurisdictional determination of the employment being maritime or in aid of commerce or of the injury having occurred upon the navigable waters of the United States. The statute also extends the National Labor Relations Act (29 U.S.C.A. §§ 151-167) to apply to any unfair labor practice on the artificial structures erected in exploration operations. Massive administrative machinery is also set up for controlling the leasing of the outer shelf and the revenues therefrom.

It is unfortunate that consideration of these statutes, the major problems incubated thereby and the litigation now pending by some of the states to test the constitutionality of the legislative quit-claim (also predicted by the author), could not be included in the author's analysis. Had such been possible, the treatise would have been currently a more complete and beneficial contribution to the literature of the controversy. As it is, the development of the several parts of the basic question presents a cohesive whole derived from exacting scholarship, exhaustive research and incisive understanding and interpretation of conflicting views. The development in international law, as well as in our own domestic law and history, of the territorial concept of the marginal sea is well focused because of the marshaling here of all of the arguments and precedents thereon. Mr. Justice Black's highly questionable rejection of that concept in *United States v. California* (332 U. S. 19) is well clarified by Dr. Bartley's superb analysis and devastating criticism of the justice's exposition of the doctrine of paramount powers of the central government as sufficient basis for rejection of California's claim to title of the submerged lands. He did not accept the government's contention of title being vested in the United States. The decision has been difficult for constitutional scholars to justify. Its importance as a precedent for unknown controversies of the future is well forecast by the author, but, as he points out, has not been fully understood in all of its significance by some of the coastal states' supporters.

The discussion of the *California* case, *supra, United States v. Louisiana* (339 U. S. 699) and *United States v. Texas* (339 U. S. 707) presents in one cover a complete analysis of the dif-

fering positions of the interested states and an understandable delineation of their respective contentions. Most valuable in this respect is the exhaustive documentation of the legislative, judicial and political developments in the states as well as on the national level. Not all partisans will be content, however, with the author's treatment of some particular contentions, such as his minimization of the validity of Louisiana's boundary-extension act (Act 55 of 1938. See Loret, *"Louisiana's Twenty-Seven Mile Maritime Belt,"* 13 Tulane Law Review, 1939, 253-57).

The author's prediction of continued substantial litigation is doubtless well-founded, but, as above sugegsted, such will probably come prolifically in broader areas of the law than his prognosis contemplates. All future cases cannot involve opposed state and national rights solely, though they unquestionably will involve in many instances common civil and criminal rights. Further judicial application of Justice Black's extension of Justice Sutherland's advancement of the paramount-rights doctrine (See *U. S. v. Curtiss-Wright Export Corp.*, 299 U. S. 304; *Cf. U. S. v. Belmont, et al.*, 301 U. S. 324) may well come in litigation over common rights between private parties. Problems of this nature are already arising to a greater extent than most inland practitioners now realize. The more reason, therefore, why the practicing lawyer needs more ready reference to the sources of the primary controversy. It is in this area that this analysis, more than a law book, will have its greatest worth, particularly on the desk of the active practitioner in coastal states such as Louisiana and Texas.

CICERO C. SESSIONS.

Effective Legal Writing

By Frank E. Cooper
Professor of Law, University of Michigan

Bobbs-Merrill, Inc. 1953 Pp. 302

This is a work that should be of use to any law student or any lawyer in the drafting of various legal writings.

The book contains two parts: part one containing eleven chapters and part two containing three chapters. There is also a bibliography and an index.

The book opens with a chapter on language used in legal

writings and gives examples of types of words and phrases that should be avoided and the reasons therefor.

It contains examples of style and warns about the various pitfalls into which the writer can be lead by habit.

This work gives examples of various forms of legal opinions, letters, pleadings, briefs, contracts, wills and statutes, and their relative merits and demerits.

Effective Legal Writing should be a reference asset to any legal library.

ROBERT E. LECORGNE, JR.

Books Received

Morris on Torts—The Foundation Press, Inc.

Jurisprudence: Men and Ideas of the Law by Edwin W. Patterson, The Foundation Press, Inc.

Commercial Transactions: Test, Forms and Statutes by Patterson, The Foundation Press, Inc.

The Federal Courts & The Federal System with Judicial Code pamphlet by Hart & Wechsler, The Foundation Press, Inc.

The Federal Loyalty-Security Program by Eleanor Bontecou, Cornell University Press.

Public Accountability of Foundation and Charitable Trusts by Eleanor K. Taylor, Russel Sage Foundation.

Office Management Manual for Legal Aid Societies by Junius L. Allison, Public Administration Service.

The Government Corporation: Elements of a Model Charter by Sidney D. Goldberg and Harold Seidman, Public Administration Service.

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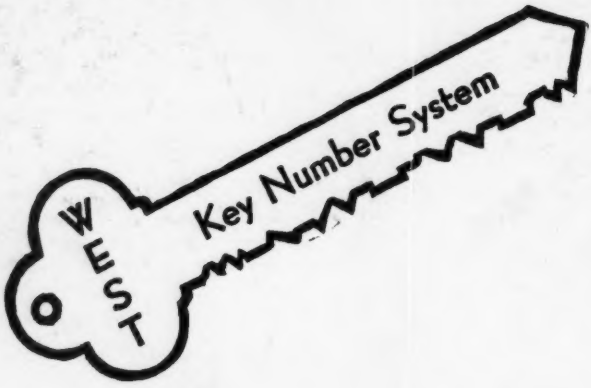

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